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In the Supreme Court

MICHAEL RODAK, JR., CLERK

OF THE

United States

OCTOBER TERM, 1977

No. **77-2931**EZRA KULKO,
Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO;SHARON KULKO HORN,
*Appellees.*On Appeal from the Supreme Court of
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August 1977

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant Ezra Kulko, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of the State of California in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California appears in 19 Cal.3d 514, 138 Cal. Rptr. 586, 564 P.2d 353 and is included herein as Appendix A.

The above opinion of the California Supreme Court vacated the opinion rendered by the Court of Appeal, First Appellate District of the State of California, appearing in 133 Cal.Rptr. 627 and which is included herein as Appendix B.

JURISDICTIONAL STATEMENT

The underlying action is one brought by appellee, Sharon Kulko Horn, against Appellant Ezra Kulko, to establish foreign judgment of divorce; to modify said foreign judgment so as to award full custody of minor children, and to increase child support payments to Mrs. Kulko. (Horn vs. Kulko, Superior Court of the State of California for the City and County of San Francisco, No. 701-626)

This appeal arises from a proceeding wherein Appellant sought a writ of mandate directing Appellee, Superior Court of the State of California of the City and County of San Francisco (hereafter Superior Court), to vacate its order denying Appellant's motion to quash service of summons for lack of jurisdiction in the underlying action.

The judgment of the Supreme Court of the State of California was entered on May 26, 1977, and became final on June 25, 1977. (California Rules of

Court, Rule 24(a)) A timely notice of appeal was filed on August 3, 1977.

The jurisdiction of this Court is invoked under the provisions of Title 28 of the United States Code, Section 1257, subparagraph (2).

Cases that sustain the jurisdiction of this Court include:

Cohen v. California (1971) 91 S.Ct. 1780, 403 U.S. 15, 29 L.Ed.2d 284, rehearing denied 92 S.Ct. 26, 404 U.S. 876, 30 L.Ed.2d 124;
Huffman v. Pursue, Ltd. (1975) 95 S.Ct. 1200, 420 U.S. 592, 43 L.Ed.2d 482;
Charleston Federal Savings and Loan Association v. Anderson (1945) 65 S.Ct. 621, 324 U.S. 182, 89 L.Ed. 857, rehearing denied.

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The validity of Section 410.10 of the California Code of Civil Procedure as construed by the Supreme Court of the State of California is here involved. C.C.P. §410.10 states:

"A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

In opposition to the California Supreme Court's construction of the above-quoted statute stands the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which is also herein involved.

QUESTION PRESENTED

Whether California's construction of C.C.P. 410.10, extending in personam jurisdiction over the nonresident appellant violates the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Appellant and Mrs. Horn were married in California on July 29, 1959, during Appellant's three-day stopover in that state while en route to Korea, where he was serving in the Armed Forces of the United States. Dr. Kulko's only other visit to California was for approximately 24 hours on his return trip from Korea to New York—again a stopover incidental to his military service.

At the time of the marriage, both parties were residents of the State of New York. Appellant is and always has been a resident of New York.

Two children were born of the marriage: Darwin, born June 23, 1961, and Ilsa, born July 10, 1962. (Appendix A, page ii) Both children were born in New York and continuously resided in that state until the transpiring of the events presented herein.

Dr. Kulko and Appellee Horn separated in March 1972. Mrs. Horn then took up residence in San Francisco, California. The parties executed a written separation agreement in New York on September 19, 1972. Immediately thereafter, the parties flew to Haiti where Mrs. Horn was granted a Decree of Divorce on September 25, 1972. (Appendix A, page ii) The written separation agreement was attached to the divorce decree and made a part thereof.

In material part, the written separation agreement provided:

"THIRD: The parties hereto hereby agree to the following with respect to the care, custody and control of the aforementioned children of their marriage:

1. That during the period of the year when the children are attending school, said children shall reside with and remain in the care, custody and control of the Husband.

2. That during the summer months of mid-June, July, August and mid-September, and during Christmas and Easter vacation weeks, said children shall reside with and remain in the care, custody and control of the Wife.

* * *

"FOURTH: The Husband hereby agrees to pay to the Wife the sum of \$3,000.00 annually for the support and maintenance of their said children during the aforementioned periods when said children reside with and are in the care, custody and control of the Wife. . . ."

Significantly, there was no agreement between the parties as to who would bear the costs of transport-

ing the children between California, Appellee Horn's new residence, and New York, where Dr. Kulko continued to reside.

In December of 1973 and just prior to her departure to California to spend Christmas vacation with her mother, Ilsa notified Appellant that she intended to live in California with her mother. Appellant, defeated by his teenaged daughter's announcement, purchased for her a one-way ticket to California. Ilsa then commenced to reside in San Francisco with her mother during the school year, spending vacations with Appellant. (Appendix A, page iii)

Darwin, meanwhile, had continued to live with his father. On January 10, 1976, Darwin called his mother and informed her that he wanted to live in San Francisco with her, and his sister. Thereupon, Mrs. Horn surreptitiously sent her son a ticket for air passage to California. Darwin immediately joined his mother, leaving New York without either the knowledge or consent of his father. (Appendix A, page iii)

On February 5, 1976, Mrs. Horn commenced the underlying action to establish the foreign judgment of divorce as a California judgment and to modify said judgment so as to award her full custody of the children, in addition to an increased amount for child support payments to be paid by Appellant. (Appendix A, page iv)

Appellant was served with a summons by mail in New York. Dr. Kulko then appeared specifically through counsel and moved for an order from Ap-

pellee Superior Court to quash service of summons pursuant to Section 418.10, Subdivision (a)(1) of the California Code of Civil Procedure, which provides:

"(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him."

* * *

In his Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons (included in the Record herein), Appellant maintained that the service should be quashed on grounds that (1) he was not a resident of California and (2) he did not have the requisite minimum contacts with the State of California to satisfy the requirements of Due Process. Appellant further stressed:

"Minimum contact for due process purposes requires at the very least an act by the defendant which produces an effect within the state so as to make the exercise of jurisdiction reasonable." (citing *Belmont Industries v. Superior Court* (1973) 31 Cal.App.3d 281, 285-6, 107 Cal.Rptr. 247)

Finally, Appellant referred to *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-17, 66 S.Ct. 154, 90 L.Ed. 95, when he cited the California case of *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 802, 100 Cal.Rptr. 477, 484, wherein the court equated "minimal contacts" with the term "relation-

ship to the State" and held that where a non-resident defendant father neither intended his activity outside California to cause any effect in that state, nor could have foreseen that it would, California did not have jurisdiction over him for the purposes of imposing child support obligations.

On May 17, 1976, Appellee Superior Court summarily denied Appellant's Motion to Quash. A copy of the minute order of Appellee Superior Court entered May 17, 1976, is attached as Appendix C herein.

Appellant filed his Petition for a Writ of Mandate appealing from the order of Appellee Superior Court with the California Court of Appeal, First Appellate District, on June 16, 1976.

In his Petition for a Writ of Mandate directing Appellee Superior Court to vacate the order of denial of Appellant's Motion to Quash and to enter an order granting Dr. Kulko's Motion, Appellant reiterated the federal question of Dr. Kulko's right to due process. Appellant pointed out:

"The order of respondent court [Appellee Superior Court] entered May 17, 1976, denying petitioner's motion to quash service of summons . . . is in excess of the jurisdiction of respondent court, and in violation of constitutional, statutory and precedential limitations on its jurisdiction, in that it violates petitioner's [appellant's] right to due process in that he is not afforded a reasonable opportunity to be heard:

(a) California Code of Civil Procedure §410.10:

'A court of this state may exercise jurisdiction on any basis not inconsistent with the

Constitution of this state or of the United States"

(b) [Amendment] V, Constitution of the United States:

'nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

(c) Precedential law setting forth constitution[al] limitations on jurisdiction:

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565;
Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339,
85 L.Ed. 278;

International Shoe Co. v. State of Washington,
326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95;

Titus v. Superior Court of the State of California, in and for the County of Contra Costa,
23 Cal.App.3d 792, 100 Cal.Rptr. 477 (1972);

Inselberg v. Inselberg, 128 Cal.Rptr. 578
(1976)."

(Petition for Writ of Mandate with Memorandum of Points and Authorities, pages 4-5).

In his Memorandum of Points and Authorities attached to his Petition for a Writ of Mandate, in addition to citing the previously mentioned *Titus* case, Appellant discussed *Inselberg v. Inselberg* (1976) 56 Cal.App.3d 484, 128 Cal.Rptr. 578—a California case reiterating the well-established constitutional principle that a forum state may subject a non-resident to in personam jurisdiction if he has both (1) "mini-

mun contacts" with the forum and (2) if maintenance of the suit does not offend the "traditional conception of fair play and substantial justice. (Citations)" (*Inselberg, supra*, 128 Cal.Rptr. 581)

Appellant further stated:

"If a nonresident's activities in the forum state are 'extensive or wide-ranging' or 'substantial . . . continuous and systematic,' jurisdiction for all causes of action is warranted. If not, then *jurisdiction depends on the quality and nature of the activities in relation to the particular cause of action* [Emphasis added]. The crucial inquiry thus concerns the character of the non-resident's activity in the forum, the substantiality of the connection of the cause of action with that activity, the balance of the convenience of the parties, and the interests of the state in assuming jurisdiction. (*Cornelison v. Chaney*, 16 Cal.3d 143, 127 Cal. Rptr. 352, 545 P.2d 264)"

(Petition for Writ of Mandate with Memorandum of Points and Authorities, page 11).

The Court of Appeal in its short opinion, Appendix B herein, found that California had personal jurisdiction over the Appellant within the constitutional limitations of C.C.P. §410.10 in that Appellant has "caused an effect in the state by an act done elsewhere." (Appendix B, page xxi) The Court of Appeal, in denying Appellant's petition, reasoned that Dr. Kulko "consented to the decision of his children to move to California and to take up residence with their mother," and that "such conduct"—i.e., his consenting—was "an act, or acts, causing an effect" in

California giving rise to a basis for in personam jurisdiction. (See Appendix B, pages xxi through xxii)

On November 17, 1976, Appellant filed his petition to the Supreme Court of the State of California for a hearing to consider the Court of Appeal's denial of his Petition for a Writ of Mandate.

In his Petition for Hearing, Appellant raised the federal question of due process for the third time:

"The effect of the denial by the Court of Appeal of Petitioner's request that service of summons be quashed for lack of personal jurisdiction is to violate Petitioner's constitutional right to due process in that he is not afforded a reasonable opportunity to be heard. *California Code of Civil Procedure* §410.10, [Amendment] V, Constitution of the United States, [Amendment] XIV, Constitution of the United States.

A hearing by this Court is required for the settlement of an important question of law, to wit:

Whether a California court has personal jurisdiction over a nonresident under Code of Civil Procedure Section 410.10 on the basis that he has caused an effect in the state by an act done elsewhere where the appellate court assumed that Petitioner voluntarily consented to his children's residence in California based on the trial court's ruling, and ruled that such conduct constituted an act causing an effect in this state. . . ."

(Petition for Hearing, page 2)

In its opinion denying Appellant's Petition for a Writ of Mandate after Appellee Superior Court de-

nied Dr. Kulko's Motion to Quash Service of Summons, the Supreme Court explained that an "effect" in a forum state by an act of a non-resident is a basis for in personam jurisdiction:

"As we explained in *Sibley* [*Sibley v. Superior Court* (1976) 16 Cal.App.3d 442, 445, 128 Cal. Rptr. 34, 546 Pac.2d 322], 'One of the recognized bases for jurisdiction in California arises when the defendant has caused an "effect" in the state by an act of omission which occurs elsewhere.' (16 Cal.3d at p. 445, 128 Cal.Rptr. at p. 36, 546 P.2d at p. 324; see also *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 43, 131 Cal.Rptr. 246; *Qualtrone v. Superior Court*, *supra*, 44 Cal.App. 3d 296, 304-306, 118 Cal.Rptr. 548; *Titus v. Superior Court*, *supra*, 23 Cal.App.3d 792, 801-802, 100 Cal.Rptr. 477.)"

(Appendix A, page v)

Yet the majority opinion of the California Supreme Court added this caveat:

"It is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an 'effect' in California could theoretically subject him to in personam jurisdiction in California. If this theory of jurisdiction were carried out to its full extremes, it is obvious that it would discourage those outside California from having any contacts or relations with persons living in our state. It has therefore been recognized that the mere causing of an effect in California is not necessarily sufficient to supply a constitutional basis for jurisdiction. 'A state has power to exercise judicial jurisdiction over an individual who causes effects

in the state by an omission or act done elsewhere with respect to causes of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable' " (Citations).

(Appendix A, pages v through vi)

The case of *Sibley*, *supra*, alluded to both *International Shoe*, *supra*, and *Hanson v. Denckla* (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283. Citing *Sibley*, the California Supreme Court:

"... emphasized the importance of showing on the record that the nonresident 'purposely availed himself of the privilege of conducting business in California or of the benefits and protections of California laws... [or] anticipated that he would derive any economic benefit as a result of his' act outside of California. (Citations) We conclude therefore that once it has been established that a nonresident defendant has caused an effect in this state by an act or omission elsewhere, the reasonableness of exercising personal jurisdiction over him on this basis may be determined according to the above criteria."

(Appendix A, pages vi through vii)

The four-justice majority opinion went on to conclude that where a non-resident defendant commits an act or omission elsewhere that has an effect in California, and it is shown that defendant has "purposely availed himself" of the benefits and protections of California law, or, at least, anticipated that he would derive economic benefits in so acting, that California in exercising in personam jurisdiction over

him is acting both reasonably and constitutionally. (See Appendix A, pages v through vii)

In holding that the exercise of jurisdiction over Dr. Kulko was reasonable, the California Supreme Court initially observed:

"... that probably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. The parent thereby avails himself of the total panoply of the state's laws, institutions and resources . . . Therefore, we start with the premise that a nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the nonresident parent for actions concerning the support of these children."

Applying the above premise to the facts of the instant case, the Supreme Court of California held that Appellant, by purchasing a one-way plane ticket to California for his daughter¹ and surrendering custody of her to Appellee, Mrs. Horn, "actively and fully consented" to his daughter taking up residence in California. The California Supreme Court went on to hold that by consenting to his daughter's contemplated permanent residence in California, Appellant "purposely availed himself of the full protection and

¹Significantly, under the separation agreement, Appellant was under no obligation whatsoever to purchase air passage—either round trip or one way—for his children when they were visiting their mother in California.

benefit of California laws." In addition, the California Supreme Court held that Appellant "derived immediate economic benefit" from these purposeful "acts." (See Appendix A, page xi)

Finally, the majority recognized that Appellant "at no time undertook any affirmative act to purposely avail himself of the benefit and protection of the laws and institutions" of California with respect to his son, Darwin. (Appendix A, page xii) However, the California court held that Dr. Kulko was subject to in personam jurisdiction for the support of both children:

"We deem it fair and reasonable for defendant to be subject to personal jurisdiction for the support of both children, where he has committed acts with respect to one child which confers personal jurisdiction and has consented to the permanent residence of the other child in California."

(Appendix A, page xiii)

Dissenting Justices Richardson and Clark squarely disagreed on all points. Justice Richardson, in writing the dissenting opinion, began by reaffirming the principles set forth in *Sibley, supra*.

"I have no quarrel with the majority's statement of general legal principles, derived primarily from our recent decision in *Sibley v. Superior Court* (1976) 16 Cal.3d 422, 128 Cal. Rptr. 34, 546 P.2d 322, and cases cited therein. As *Sibley* explains, however, 'The mere causing of an "effect" in California, . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this "effect," the im-

position of jurisdiction may be "unreasonable." [Citations] In determining whether or not to impose jurisdiction, *Sibley* explains that it is necessary for the court to ascertain whether the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' (P. 447, 128 Cal.Rptr. p. 37, 546 P.2d p. 325)" [Emphasis supplied]

(Appendix A, pages xiv through xv).

The dissent went on to acknowledge that the controlling principle relevant in the determination of the *Sibley* court was derived from the leading U.S. Supreme Court opinion in *Hanson v. Denckla, supra*, 357 U.S. at 253, 78 S.Ct. at 1239, where this Court held:

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

(Appendix A, page xv).

Justice Richardson disagreed with the majority opinion's application of *Sibley* to the present case, in that Appellant's passive submission to his teenaged daughter's unilateral decision to live in California and his mere purchase of Ilsa's air passage to California could in no way be reasonably considered a

purposeful availment of the benefits and protections of California laws:

"The majority reasons, without citation of supporting authorities, that whenever a parent 'permits' his minor child to reside in California, the parent thereby 'avails himself of the total panoply of the state's laws, institutions and resources. . . .' [Citations] Yet, can such an act of acquiescence fairly and realistically be viewed as 'purposeful' conduct? According to respondent, Ilsa 'told' petitioner that she was going to live with respondent in California. Petitioner's unresisting assent to Ilsa's decision discloses no intent on his part, purposeful or otherwise, to enjoy the 'panoply' of California's resources."

(Appendix A, pages xvi through xvii).

Finally, the dissent notes that Appellant took neither direct nor indirect action to invoke the protections of California law with respect to his son, who left for California without either Dr. Kulko's consent or knowledge. (See Appendix A, page xvii)

The judgment of the California Supreme Court became final thirty days after entry of the judgment; i.e., June 25, 1977. (Cal. Rules of Court, Rule 24 (a))

Notice of Appeal to the United States Supreme Court was timely filed on August 3, 1977, and is included herein as Appendix D.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

As construed by California's highest court, C.C.P. Section 410.10 enables California to exercise in per-

sonam jurisdiction over a nonresident father whose sole connection with that forum state was the mere purchase of one-way air passage for his teenaged daughter after he passively submitted to her decision to live with her mother in that state. This far-reaching extension of California's long arm statute and the implications thereof raise serious questions under the Due Process Clause of the Fourteenth Amendment. Further, and perhaps even more important, the California decision will have an inhibiting effect on the free interstate flow of children of divorced parents living in different states.

CALIFORNIA'S CONSTRUCTION OF C.C.P. §410.10 DENIES APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

This Court has long held that in order to subject a nonresident defendant to in personam jurisdiction, Due Process requires that he have certain minimum contacts with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe, supra*)

The Supreme Court, in view of the "traditional notions of fair play and substantial justice," has further delineated the boundaries of permissive state jurisdiction over the nonresident defendant, stating:

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with

the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . ."

(*Hanson v. Denckla, supra*, 357 U.S. at 253, 78 S.Ct. at 1239, emphasis added).

California's long-arm statute, C.C.P. §410.10 provides:

"A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

As aptly put by the United States Court of Appeals, Ninth Circuit in *Republic International Corporation v. Amco Engineers, Inc.* (9th Cir. 1975) 516 F.2d 161, 167:

"This is indeed a long arm. We have described it in this fashion. 'The jurisdiction of California courts is therefore coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the U.S. Supreme Court.' *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974)."

Previous to the instant case, California courts have acknowledged that C.C.P. §410.10 was subject to due process limitations. In *Buckeye Boiler Co. v. Superior Court of Los Angeles County* (1969) 71 Cal.2d 893, 80 Cal.Rptr. 113, 458 P.2d 57, the California

Supreme Court extensively cited the language of *Hanson v. Denckla, supra*:

"A defendant not literally 'present' in the forum state may not be required to defend [himself] in that state's tribunal unless the 'quality and nature of the defendant's activity' in relation to a particular cause of action makes it fair to do so [citations]. Such a defendant's activities must consist of 'an act done or transaction consummated in the forum State' or 'some [other] act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.' (*Hanson v. Denckla, supra*, 357 U.S. at pages 251, 253, 78 S. Ct. at pages 1238, 1240.)"

(*Buckeye Boiler*, 80 Cal.Rptr. at pages 117 to 118).

The *Buckeye* court recognized that in order to assume jurisdiction over a nonresident, due process requires not only a finding of the "threshold of sufficient activity" in the forum state, but also required is a balancing of the inconvenience to the defendant in having to defend himself in the forum state against the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (*Buckeye, supra*, 71 Cal.2d at 899, 80 Cal. Rptr. at 118) In sum:

"To conclude that the assumption of jurisdiction over a defendant comports with due process does not end the inquiry; the exercise of jurisdiction must be reasonable as well."

(*Republic International Corporation, supra*, 516 F.2d at 167, citing *Buckeye, supra*).

In the recent case of *Sibley, supra*, the California Supreme Court employed a "cause-effect" test in California's exercise of in personam jurisdiction:

"One of the recognized bases for jurisdiction in California arises when the defendant has caused an 'effect' in the state by an act or omission which occurs elsewhere."

(*Sibley, supra*, 16 Cal.3d at 445, 128 Cal.Rptr. at 36, citing *Quattrone v. Superior Court, supra*, and *McGee v. International Life Insurance Company* (1957) 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223).

Yet the *Sibley* court recognized that the unfettered application of the above "cause-effect" test would be both potentially limitless and "constitutionally 'unreasonable.' " (*Sibley, supra*, 16 Cal.3d at 446, 128 Cal.Rptr. at 37) Relying on *Hanson v. Denckla, supra*, the California Supreme Court in *Sibley* then limited the "cause-effect" test by stating that the prerequisite finding for the reasonable exercise of jurisdiction is the "purposeful availment" of either (1) the privilege of conducting business in California or (2) the benefits and protections of California law. (See *Sibley, supra*, 16 Cal.3d at pages 446 to 447, 128 Cal.Rptr. pages 36-37)

It is submitted that the exercise of personal jurisdiction over Appellant is manifestly contrary to the explicit rules set forth in the United States Supreme Court cases of *International Shoe v. Washington, supra*, and *Hanson v. Denckla, supra*, as well as the

California cases of *Buckeye Boiler Company, supra*, and *Sibley, supra*.

(1) Appellant's conduct was not purposeful.

Dr. Kulko merely submitted when his teenage daughter announced her decision to reside in California. Such negative conduct can in no way be considered "purposeful."

(2) Appellant has not invoked the benefits and protection of California laws.

The Record establishes no intent whatsoever on Dr. Kulko's part of having any connection with California, with the exception of the purchase of one-way air passage which he was under no obligation to purchase in the first place. On the contrary, in his efforts to be a loving and accommodating father, the California laws, from which Dr. Kulko has allegedly derived benefit and protection, have forced him to defend his constitutional rights all the way up to the highest court in the land.

(3) The imposition of in personam jurisdiction over Appellant is manifestly unreasonable.

The agreement which Mrs. Horn seeks to modify was written and executed in New York. Appellee Horn, either on her own or through counsel retained in New York, could have promptly modified the agreement in Appellant's home state. It is a matter of record that this might not have even been necessary, since Appellant, prior to the action commenced by Mrs. Horn, offered to renegotiate the settlement agree-

ment. (See Appendix B, pages xxi through xxii) Further, to subject Appellant to personal jurisdiction is unreasonable, in that Mrs. Horn could conceivably institute repeated modification actions in the future, thereby forcing Appellant to come to California to defend multiple, and possible vexatious, lawsuits.

To exercise jurisdiction over Appellant, who has not set foot in California since 1951, and who has committed no "purposeful" acts other than the passive acceptance of his daughter's mandate, and who has been compelled to specially appear because of the unilateral activity of Appellee, Mrs. Horn, and the children of the marriage, offends "traditional notions of fair play and substantial justice." (*International Shoe v. Washington, supra*; *Hanson v. Denckla, supra*) To allow California courts to exercise jurisdiction in the present case will insure the "potentially limitless" and "unreasonable" exercise of jurisdiction that the *Sibley* court warned against. By logical extension, it would be a matter of time before a collect phone call paid for by a California resident would be sufficient to give rise to jurisdiction over the out-of-state caller, who "purposefully" made that phone call and caused an effect in California, since the resident of the forum state must pay for the call, allowing the nonresident to derive "immediate economic benefit" therefrom.

Aside from the clear infringement of Appellant's right to due process of law, there are grave implica-

tions in the holding of the California Supreme Court in the present case:

In 1970, 15% of all children under 18 years of age were living with one or both parents who had been divorced after their first or most recent marriage.⁹

Of children of school age, more than 30% were living with a divorced parent in 1971.⁹

Given our highly mobile society and the fact that the amount of children involved in divorce was close to one million in 1971 alone,⁹ the total number of children in the United States with divorced parents living in two separate states must be quite substantial.

In view of the above statistics, the holding of the California Supreme Court contravenes the "strong" public policy which California courts have repeatedly asserted in favoring the visitation of children with their natural parents and in encouraging cooperation between divorced parents. (See the dissenting opinion in Appendix A, pages xvi through xviii) Out-of-state parents would have substantial ground to refuse to allow their children to visit the California parents, lest in personam jurisdiction be conferred over the nonresident. The rule announced in the present case thus encourages prudent nonresident parents to refuse all cooperation and visitation with California

⁹Paul C. Glick, *Journal of Marriage and the Family*, Volume 37, No. 1 (February 1975), "The Demographer Looks at American Families," page 21. (Mr. Glick is employed by the population Division, Bureau of the Census.)

⁹Ibid, page 22.

⁹Ibid, page 22.

parents, thus is in direct opposition to the well-established "strong" public policies enunciated in the California cases of *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246, and *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 803, 100 Cal.Rptr. 477.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that this Court has jurisdiction over this Appeal under Section 1257 (2), Title 28, United States Code, and that this Appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated, August 11, 1977.

Respectfully submitted,
LAWRENCE H. STOTTER,
STERN, STOTTER & O'BRIEN,
Attorneys for Appellant.

Of Counsel:

EDWARD SCHAEFFER.

(Appendices Follow)

Appendices

Appendix A

(Cite as 19 Cal.3d 514, 138 Cal.Rptr. 586, 564 P.2d 353)

Supreme Court of California
In Bank

S.F. 23574

Ezra Kulko,	Petitioner,
vs.	
The Superior Court of the City and County of San Francisco,	Respondent;
Sharon Kulko Horn,	Real Party in Interest.

[May 26, 1977]

SULLIVAN,* Justice.

In this proceeding brought pursuant to section 418.10, subdivision (c), of the Code of Civil Procedure, petitioner Ezra Kulko seeks a writ of mandate directing respondent superior court to vacate its order denying petitioner's motion to quash service of summons for lack of jurisdiction in the underlying action, to establish a foreign judgment of divorce, and to grant said motion. We have concluded that the trial court correctly denied the motion. We deny the petition.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Viewing the evidence under the well-settled rules governing review of an order based on affidavits,¹⁴⁴ we set forth the pertinent facts.

On September 25, 1972, after 13 years of married life, real party in interest Sharon Kulko (hereafter plaintiff) was granted a decree of divorce from petitioner Ezra Kulko (hereafter defendant) by the Civil Court of Port-au-Prince in the Republic of Haiti. There were two children born of the marriage: Darwin, born June 23, 1961, and Ilsa, born July 10, 1962. Under a written separation agreement, entered into by the parties in New York, their marital domicile, and thereafter attached to and made a part of the decree, it was agreed that during the period of the year when they were attending school Darwin and

¹⁴⁴ "An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary. In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review." [Citations.] When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed." (*Griffith v. San Diego College for Women* (1955) 45 Cal.2d 501, 507-508, 289 P.2d 476, 479; see also *Lynch v. Spilman* (1967) 67 Cal.2d 251, 259, 62 Cal.Rptr. 12, 431 P.2d 636; *Doak v. Bruson* (1907) 152 Cal. 17, 19, 91 P. 1001; *Detsch & Co. v. Calbar Inc.* (1964) 228 Cal.App.2d 556, 563, 39 Cal.Rptr. 626; *DeWit v. Glazier* (1957) 149 Cal.App.2d 75, 81-82, 307 P.2d 1031.)

Ilsa should reside with and remain in the care, custody and control of defendant and that during the summer months and Christmas and Easter vacation weeks, they should reside with and remain in the care, custody and control of plaintiff. The agreement recited that defendant resided in New York and plaintiff in San Francisco. Defendant agreed to pay \$3,000 annually for the support of the children during the time they resided with their mother in California.

During 1973, in accordance with the agreement, both children were sent to San Francisco and returned to New York. However, in December 1973, on the eve of her departure to spend the Christmas vacation with her mother, Ilsa informed her father that she wanted to live in California with her mother. Defendant thereupon purchased a one-way airplane ticket for her and she left with all her clothes. Throughout 1974 and 1975 Ilsa resided with her mother in California during the school year and with her father in New York during the summer. At the end of each summer, defendant provided her with an airplane ticket and she returned to live with her mother in San Francisco during the school year.

Meanwhile, throughout this period Darwin had continued to live with his father during the school year and his mother during the summer and on vacation. On January 10, 1976, Darwin telephoned plaintiff from New York, informing her that he was in trouble, that his father did not want him and that he wished to come to San Francisco to live with her. She sent him an airplane ticket and he immediately joined her in San Francisco.

Three weeks later, on February 5, 1976, plaintiff commenced the underlying action to establish the Haitian divorce as a judgment of this state, to award custody of the children to plaintiff and to receive increased child support from defendant. On the same day, the trial court granted plaintiff temporary custody of Darwin and Ilsa and restrained both parties from removing the children from plaintiff's home. Defendant, who had been served with summons by mail in New York, made a special appearance in California and moved for an order to quash service of summons (Code Civ.Proc. § 418.10, subd. (a)(1) for lack of personal jurisdiction in that he was not a resident of California and did not have the requisite minimum contacts with California to satisfy due process requirements. Defendant supported his motion with two personal affidavits and plaintiff responded with an affidavit in opposition. The trial court denied the motion. This proceeding for a writ of mandate followed. (Code Civ.Proc. § 418.10, subd. (c).)

No contention is made before us that the trial court lacked jurisdiction to determine the custody of Darwin and Ilsa. (See Civ.Cod § 5152; *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 797-198, 100 Cal.Rptr. 477; see *Sampsell v. Superior Court* (1948) 32 Cal.2d 763, 777-779, 197 P.2d 739; Rest.2d Conflict of Laws, § 79, pp. 237-240.) However, in order to impose upon defendant a personal liability to support the children, the court must secure personal jurisdiction over him. (*Titus v. Superior Court, supra*, 23 Cal.App.3d 792, 799, 100 Cal.Rptr. 477; *Schoch v. Superior Court* (1970) 11 Cal.App.3d 1200, 1207, 90

Cal.Rptr. 365. In order to secure personal jurisdiction over a nonresident defendant by service of summons by mail outside California, the trial court must have power to exercise such jurisdiction under section 410.10 of the Code of Civil Procedure which provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." This section includes all the recognized bases of judicial jurisdiction (*Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296, 302 118 Cal.Rptr. 548; Judicial Council comment to Code Civ.Proc., § 410.10, 14 West's Ann. Code Civ.Proc. (1973 ed.) p. 459) and manifests an intent that the courts of California utilize all such bases, limited only by constitutional considerations. (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445, 128 Cal.Rptr. 34, 546 P.2d 322.)

As we explained in *Sibley*, "One of the recognized bases for jurisdiction in California arises when the defendant has caused an 'effect' in the state by an act or omission which occurs elsewhere." (16 Cal.3d at p. 445, 128 Cal.Rptr. at p. 36, 546 P.2d at p. 324; see also *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 43, 131 Cal.Rptr. 246; *Quattrone v. Superior Court, supra*, 44 Cal.App.3d 296, 304, 306, 118 Cal.Rptr. 548; *Titus v. Superior Court, supra*, 23 Cal.App.3d 792, 801, 802, 100 Cal.Rptr. 477.) It is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an "effect" in California could theoretically subject him to *in personam* jurisdiction in California. If this theory

of jurisdiction were carried out to its full extremes, it is obvious that it would discourage those outside California from having any contacts or relations with persons living in our state. It has therefore been recognized that the mere causing of an effect in California is not necessarily sufficient to supply a constitutional basis for jurisdiction. "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action, arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." (Judicial Council comment to Code Civ.Proc. § 410.10, 14 West's Ann.Code Civ.Proc. (1973 ed.) p. 472.) In *Sibley*, after alluding to the principles set forth by the United States Supreme Court in *International Shoe v. Washington* (1945) 326 U.S. 310, 316-317, 66 S.Ct. 154, 90 L.Ed. 95, and in *Hanson v. Denckla* (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283, we attempted to distill the criteria for determining whether or not the exercise of jurisdiction over a nonresident on this basis was reasonable. We emphasized the importance of a showing on the record that the nonresident "purposely availed himself of the privilege of conducting business in California or of the benefits and protections of California laws . . . [or] anticipated that he would derive any economic benefit as a result of his" act outside of California. (16 Cal.3d at p. 447, 128 Cal.Rptr. at p. 37, 546 P.2d at p. 325.) We conclude therefore that once it has been established that a non-resident defendant has caused an effect in this state

by an act or omission elsewhere, the reasonableness of exercising personal jurisdiction over him on this basis may be determined according to the above criteria.

In the case at bench, we are called upon to apply the foregoing principles to an important area of family law, namely acts or omissions by nonresident parents outside of California which affect their children, and their relationship with their children, who are physically present in California. Initially we observe that probably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. The parent thereby avails himself of the total panoply of the state's laws, institutions and resources—its police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums, to mention only a few. Therefore, we start with the premise that a nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the non-resident parent for actions concerning the support of these children.

Two recent opinions by the Courts of Appeal have identified strong public policies affecting the reasonableness of asserting personal jurisdiction over non-resident parents of children physically present in the

state. In *Titus v. Superior Court*, *supra*, 23 Cal.App. 3d 792, 803, 100 Cal.Rptr. 477, 485, the court said: "It is a strong policy of the law to encourage the visitation of children with their parents. Such a policy should be fostered rather than thwarted." In *Judd v. Superior Court*, *supra*, 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246, 249, a different appellate district declared: "It should be a matter of strong public policy to encourage the payment of support and communication between a natural father and his children, not to discourage the same by subjecting the father to the expense and inconvenience of relitigating this matter of support in our state." In each case the Court of Appeal, upon application of these strong public policies to the particular facts before it, concluded that it would be unreasonable to impose personal jurisdiction.

In *Titus*, the father, who has custody of the children under a Massachusetts divorce decree, sent the children to California to visit their mother for the summer, pursuant to a subsequent written custody agreement. The agreement specified that the children were to be returned to the father in Massachusetts by the end of August. The mother, in breach of the agreement, retained the children, and brought an action in California to establish the foreign divorce decree as a judgment, to obtain custody of the children and to secure support payments from the father. While the father may have in a sense purposely availed himself of the benefits and protections of the laws of California by sending his children here, his

purpose was merely to have them visit their mother for a limited time and in compliance with the written agreements between the parents, which also provided for child support payments by him to the mother during the visit. It was clear that the purpose of the father's act was supported by a strong policy of the law which would be thwarted if the parent thereby became subject to personal jurisdiction. "If a parent, who has custody of his children, is faced with the prospect of submitting himself to the jurisdiction of another state by the mere act of sending his children to that state for the purpose of visiting with the other parent, it is reasonable to assume that he would refrain from doing so rather than running such risk, particularly in view of the inconvenience and costs attendant to litigating in another state." (23 Cal.App. 3d at p. 803, 100 Cal.Rptr. at p. 485.)

In *Judd*, the parties had lived in New York and Connecticut until their separation. They entered into a written separation agreement and the wife then obtained a Mexican divorce decree which incorporated the terms of the separation agreement. She then moved to California with the minor children of whom she had custody. The father never resided in California but visited the children there and, pursuant to their agreement, sent the mother spousal and child support payments. Ten years after her Mexican divorce, the mother filed a petition for dissolution of marriage in California, seeking among other things custody of the children and spousal and child support. The Court of Appeal issued a writ of mandate directing the quashing

of the service of summons on the father insofar as the summons purported to exercise personal jurisdiction over the father for spousal and child support. In *Judd* the father had not purposely availed himself of the protections and benefits of the laws of California since he had never had custody of the children and had not sent them to California. The Court of Appeal concluded that it would be neither fair nor reasonable to hold that this state acquired jurisdiction over the father merely because he sent support payments to California, communicated with his children by mail or telephone, and visited them here, since to do so would thwart the public policy of encouraging a parent's support of, and communication with his children.

In the case at bench, defendant sent Ilsa to California in December 1973 to visit her mother for the Christmas vacation in accordance with terms of the separation agreement incorporated in the divorce decree. Under *Titus* it is clear that this act in itself would not confer jurisdiction over defendant. At that time, however, defendant knew that Ilsa wanted to stay permanently with her mother in California and in apparent recognition of this desire he purchased for Ilsa only a one-way ticket and allowed her to take all her clothing. These facts would suggest that defendant at least contemplated surrendering custody of Ilsa to the mother in California and sent her to California with an apparent intention of allowing her to remain and thereafter reside permanently there. This intention was finalized in 1974 when Ilsa returned to New York to spend the summer with defendant.

At the end of the summer, he bought her a ticket to return to California to live with her mother for the school year. The same procedure was repeated in the summer of 1975. Thus it is clear that defendant actively and fully consented to Ilsa living in California for the school year and that he twice sent her to California for that purpose. Here, unlike *Titus*, defendant did not send Ilsa to California for a mere temporary visit, but for permanent residence with plaintiff subject only to summer visits in New York. By doing so, defendant purposely availed himself of the full protection and benefit of California laws for the care and protection of Ilsa on a permanent basis. In view of the factor of Ilsa's permanent residence here, we apprehend no thwarting of the public policy supported by the *Titus* court.

We deem it fair and reasonable to extend the jurisdiction of the courts of this state over defendant on the basis of his acts of sending Ilsa into this state to reside permanently with her mother. Not only has defendant by these acts availed himself of the full benefit and protection of the laws of this state, but he has also derived immediate economic benefit from them. Under the terms of the decree, he had custody of Ilsa and was liable for her support while she lived with him. He paid support to the mother under the decree only for the summer, Christmas and Easter vacations. Therefore, by allowing the child to live with the mother throughout the school year, he was no longer liable for the child's support for that period—a clear economic benefit.

We observe, however, that while defendant's acts with respect to Ilsa form a basis to confer personal jurisdiction over him, he has not by any act or omission outside California with respect to his other child, Darwin, caused an effect in this state which independently of the foregoing considerations would confer such jurisdiction. It will be recalled that Darwin came to California to live permanently with his mother at his own request, by an airplane ticket paid for and sent to him by his mother, and without defendant's knowledge. It would appear that subsequently defendant consented to this *fait accompli* in that he has not undertaken any action to retrieve the child and has even indicated his assent to this state of affairs by letter. Nevertheless, although he has consented to Darwin's permanent residence in California, and he will thereby derive economic benefit by no longer being liable for Darwin's support throughout the school year, the fact remains that he at no time undertook any affirmative act to purposely avail himself of the benefit and protection of the laws and institutions of this state. He did not send Darwin to California, nor indeed know of the latter's departure from New York beforehand. Therefore, under the principles set forth above, defendant would not have been subject to jurisdiction in personam in California for Darwin's support, if Darwin were the sole child of the parties.

Nonetheless, we conclude that this fact does not deprive the court of personal jurisdiction over defendant for the support of *both* children since the

support of both is presented as a single issue in the underlying action. The separation agreement, which was incorporated into the Haitian decree sought to be established as a judgment of this state, provided for the payment of \$3,000 annually for the support of *both* children. The complaint seeks support for both children. Defendant's motion to quash and supporting affidavits assert lack of jurisdiction over both children. We deem it fair and reasonable for defendant to be subject to personal jurisdiction for the support of both children, where he has committed acts with respect to one child which confers personal jurisdiction and has consented to the permanent residence of the other child in California.²

The alternative writ of mandate is discharged and the petition for a peremptory writ is denied.

TOBRINER, Acting C. J., and MOSK and WRIGHT (Retired Chief Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council), JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent. In my view, it is unreasonable to subject petitioner to the jurisdiction of the California courts under the circumstances in this case. Petitioner's contacts with this state are far too minimal to justify in personam jurisdiction on any of the accepted and recognized bases.

²To the extent that *Starr v. Starr* (1953) 121 Cal.App.2d 633, 263 P.2d 675, is inconsistent with the views expressed in this opinion, it is disapproved.

It is uncontradicted that petitioner has never resided in California and has had only two brief, isolated contacts with the state during his entire life. He is a resident of New York, the site of the marital domicile, and he has no business interests in California. As the majority indicates, after the parties separated respondent wife obtained a divorce in Haiti and moved to California where, pursuant to agreement with petitioner, she visited with the children during the summer and holidays. Petitioner maintained custody of the children in New York during the school year.

According to respondent's affidavit in opposition to petitioner's motion to quash, in December 1973 "Ilsa told her father before she left for Christmas vacation that she wanted to live with her mother now." Petitioner allegedly acceded to Ilsa's announcement, bought her a one-way air ticket to California, and since that time has seen Ilsa in New York only during the summers. As for son Darwin, respondent, in her affidavit, alleged that in January 1976 Darwin called her and told her he wanted to come to San Francisco to live, that she sent him a plane ticket, and that he (and Ilsa) presently live with respondent in California. (We may assume the truth of the foregoing allegations, although it is noteworthy that petitioner's own affidavit alleged that respondent induced both Ilsa and Darwin to leave New York without petitioner's knowledge or consent.)

I have no quarrel with the majority's statement of general legal principles, derived primarily from

our recent decision in *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322, and cases cited therein. As *Sibley* explains, however, "The mere causing of an 'effect' in California . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be 'unreasonable.'" (P. 446, 128 Cal.Rptr. p. 37, 546 P.2d p. 325.) In determining whether or not to impose jurisdiction, *Sibley* explains that it is necessary for the court to ascertain whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (P. 447, 128 Cal.Rptr. p. 37, 546 P.2d p. 325, italics added.) In *Sibley*, we were quoting from the leading Supreme Court opinion in *Hanson v. Denckla* (1958) 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 which expressed as follows the controlling principle relevant to our determination: "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Noting that the nonresident's conduct must be "purposeful," I disagree with the majority's application

of the foregoing principles to the particular facts of this case. As to Ilisa, the majority describes petitioner's conduct as "actively and fully consent[ing] to Ilisa living in California" subject only to summer visits in New York and hold that such conduct constitutes sufficient ground upon which to confer personal jurisdiction over petitioner. In the majority's eyes, petitioner "purposely availed himself of the full protection and benefit of California laws for the care and protection of Ilisa on a permanent basis." (Ante, p. 59) of 138 Cal.Rptr., p. _____ of _____ P.2.) If, however, we are to give any reasonable meaning to the phrase "*purposely* availed," the record before us discloses no evidentiary support whatever, even if we disregard petitioner's recitation of events and accept respondent's version. Petitioner may have purchased Ilisa's air passage to California, but my reading of the record indicates no *purposeful* conduct by him which reasonably can be said to invoke the benefits and protections of California laws, thereby conferring in personam jurisdiction over him. At best, petitioner passively acquiesced in his teenaged daughter's unilateral decision to live in California.

The majority reasons, without citation of supporting authorities, that whenever a parent "permits" his minor child to reside in California, the parent thereby "avails himself of the total panoply of the state's laws, institutions and resources" (Ante, p. 589 of 138 Cal.Rptr., p. _____ of _____ P.2.) Yet, can such an act of acquiescence fairly and realistically be viewed as "purposeful" conduct? According to re-

spondent, Ilisa "told" petitioner that she was going to live with respondent in California. Petitioner's unresisting assent to Ilisa's decision discloses no intent on his part, purposeful or otherwise, to enjoy the "panoply" of California's resources.

If, however, petitioner's actions with respect to Ilisa can be rationalized as "purposeful conduct," there is no basis on which to support in personam jurisdiction over petitioner as to Darwin. The record reveals that, as to his son, petitioner has done absolutely nothing which can be said to have caused an effect in California. Darwin came to live in California at his own request and without petitioner's knowledge. Petitioner neither knew of, nor lifted a finger to assist, Darwin's flight to California. His airplane ticket was paid for by respondent. All that can be said is that when petitioner learned of the development he passively accepted a situation not of his own making. He took no action, direct or indirect, to invoke the protections of California's laws. Under such circumstances, no basis exists in this record upon which to impose in personam jurisdiction over petitioner as to Darwin's.

The majority imposition of in personam jurisdiction over absent parents under circumstances such as here presented may well conflict with the "strong" public policy which California courts have asserted favoring the visitation of children with their parents, and encouraging cooperation between parents. (See *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246; *Titus v. Superior Court* (1972)

23 Cal.App.3d 792, 803, 100 Cal.Rptr. 477.) The rule announced by the majority may encourage a divorced parent such as petitioner to forbid or physically prevent his or her children from visiting a California parent, lest in personam jurisdiction be thereby conferred over the nonresident parent. Such parents may well become extremely guarded and cautious when they suspect that a child's change of residence is contemplated or effected, either unilaterally or with the connivance of the California parent. Prudent nonresident parents may simply refuse all cooperation and visitation whatever, thus contravening well established public policies.

Finally, were we to hold that petitioner's contacts in California were insufficient to justify imposition of in personam jurisdiction over him, respondent would not be rendered wholly remediless. No reason appears of record why respondent could not retain New York counsel to pursue the action against petitioner in the state where he resides.

I would issue the writ.

CLARK, J., concurs.

Appendix B

(Cite as App., 133 Cal.Rptr. 627)

Court of Appeal, First District,
Division 4.

Civ. 39296.

Ezra Kulko,	Petitioner,
vs.	
Superior Court of the State of California for the City and County of San Francisco,	Respondent,
Sharon Kulko Horn,	
	Real Party in Interest.

[Oct. 8, 1976.]

[Hearing Granted Dec. 16, 1976.]

EMERSON,* Associate Justice (Assigned).

Petitioner seeks a writ of mandate after respondent court denied his motion to quash service of summons. The action underlying the petition is brought by real party in interest, Sharon Horn, who is petitioner's former wife and the mother of their two children. The complaint seeks establishment as a

*Retired Judge of the Superior Court sitting under assignment by the Chairman of the Judicial Council.

California judgment of a foreign divorce decree (Haiti) and also requests orders for custody and support of the children.

Petitioner concedes that the superior court has jurisdiction of the subject matter of the action and also has authority to determine the question of child custody. He contends, however, that the court lacks personal jurisdiction to impose upon him an obligation of increased child support.

It has been determined that a California court cannot impose upon a father a personal liability or obligation for child support unless it obtains personal jurisdiction over him. (*Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 100 Cal.Rptr. 477.) The relevant principles of the California law pertaining to personal jurisdiction in *Titus* were summarized as follows: "In order to obtain personal jurisdiction over petitioner by service outside the state, it is necessary that the California court have power to exercise such jurisdiction under Code of Civil Procedure section 410.10 which provides: 'A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.' The general provision is said 'to incorporate in California law, without specific statute or decision by our own courts, any basis of jurisdiction established now or in the future by courts properly appraising constitutional limitations.' (1 Witkin, Cal.Procedure (2d ed. 1970) § 7, p. 532.) [1] Witkin observes that the recognized bases of judicial jurisdiction are those listed in the Restatement and

that these have, in essence, been incorporated in Code of Civil Procedure section 410.10. (See 1 Witkin, Cal.Procedure (2d ed. 1970) § 72, pp. 601-602.) These bases are the following: '(a) presence; (b) domicile; (c) residence; (d) nationality or citizenship; (e) consent; (f) appearance in an action; (g) doing business in the state; (h) an act done in the state; (i) causing an effect in the state by an act done elsewhere; (j) ownership, use or possession of a thing in the state; (k) other relationships to the state which make the exercise of judicial jurisdiction reasonable.' (Rest.2d Conflict of Laws, § 27, p. 120; see 1 Witkin, Cal.Procedure (2d ed. 1970) § 77, pp. 601-602.)" (*Id.* at p. 799, 100 Cal.Rptr. at p. 483.)

Under the facts of this case, petitioner is subject to California's personal jurisdiction only if his conduct fell within the provision of subparagraph (i) of the bases listed above, that is, that he caused an effect in this state by an act done elsewhere.

If he consented to the decision of his children to move to California and to take up residence with their mother it is clear that such conduct was an act, or acts, causing an effect in this state. The mother is now faced with the direct and immediate financial burdens of providing for the children's food, shelter, clothing, schooling, and other needs. That petitioner recognizes this effect is apparent from the following language contained in a letter which he wrote to the mother: "I would like to renegotiate the original agreement with you in as much as it is invalidated. I would like for you to present to me

what you feel would be a fair & equitable arrangement. I would like to do it without lawyers as you know how I feel about them."

The question whether petitioner voluntarily consented to his children's residence in California is one of fact. It was presented to the court on conflicting evidence. Although the judge made no finding on this point we must assume that he resolved it in favor of real party, since this result supports his decision. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193; 6 Witkin, Cal.Procedure (2d ed. 1971) Appeal, § 235, pp. 4225-4226.)

The alternative writ of mandamus is discharged and the petition for a peremptory writ is denied.

RATTIGAN, Acting P. J., and CHRISTIAN, J., concur.

Appendix C

Superior Court of the State of California
for the City and County of San Francisco
Department 10

No. 701-626

Sharon Kulko Horn	} Plaintiff,
vs.	
Ezra Kulko	
	Defendant.

[May 17, 1976]

MINUTE ORDER

The motion of the respondent to quash the service and summons of the petitioner is hereby ordered denied.

Dated 5/17/76

/s/ S. Lee Vavuris

S. Lee Vavuris

Judge of the Superior Court

Appendix D

In the Supreme Court of the State of California

S.F. 23574

Ezra Kulko,

Petitioner,

vs.

Superior Court of the State of California in
and for the City and County of San Francisco,

Respondent,

Sharon Kulko Horn,

Real Party in Interest.

**NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES**

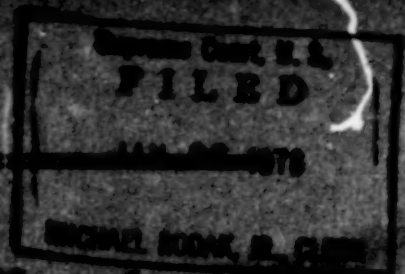
Notice is hereby given that Ezra Kulko, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of The Supreme Court of the State of California denying Appellant's Petition for a Writ of Mandate entered in this proceeding on May 26, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated: August 1, 1977.

/s/ Lawrence H. Stotter
Lawrence H. Stotter
465 California Street #400
San Francisco, California 94104

APPENDIX



In the Supreme Court
of the
United States

OCTOBER TERM, 1977

No. 77-293

EBBA KULKO,
Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO;
SHARON KULKO HORN,
Appellee.

On Appeal from the Supreme Court of
the State of California

Filed August 22, 1977
Jurisdiction Perfect by December 5, 1977

APPENDIX

In the Supreme Court
OF THE
United States

—
OCTOBER TERM, 1977
—

No. 77-293
—

EZRA KULKO,
Appellant,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO;
SHARON KULKO HORN,
Appellees.

—
On Appeal from the Supreme Court of
the State of California

Filed August 20, 1977
Jurisdiction Postponed December 5, 1977

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- March 1, 1976—Summons and Affidavit of Service—Superior Court, City and County of San Francisco
- April 1, 1976—Notice of Motion To Quash Service of Summons for Lack of Personal Jurisdiction—Superior Court, City and County of San Francisco
- May 6, 1976—Declaration in Support of Motion To Quash Service of Summons—Superior Court, City and County of San Francisco
- May 10, 1976—Affidavit in Opposition To Motion To Quash Service of Summons—Superior Court, City and County of San Francisco
- May 17, 1976—Minute Order of San Francisco Superior Court Denying Motion To Quash—Superior Court, City and County of San Francisco
- June 16, 1976—Petition for Writ of Mandate—California Court of Appeal
- August 4, 1976—Alternative Writ of Mandate—California Court of Appeal

September 2, 1976—Return of Sharon Kulko Horn,
Real Party in Interest, By Way of Verified An-
swer To Alternative Writ of Mandate—Calif-
ornia Court of Appeal

October 8, 1976—Opinion of Court of Appeal dis-
charging Alternative Writ and denying Petition
for Peremptory Writ

November 17, 1976—Petition for Hearing—California
Supreme Court

November 29, 1976—Answer of Sharon Kulko Horn to
Petition for Hearing—California Supreme Court

May 26, 1977—Opinion of California Supreme Court
holding that California has jurisdiction over Ap-
pellant—California Supreme Court

August 3, 1977—Notice of Appeal to the Supreme
Court of the United States—California Supreme
Court

August 20, 1977—Appeal docketed in United States
Supreme Court

Superior Court of the State of California
for the City and County of San Francisco

—
No. 701 626
—

Sharon Kulko Horn,	Plaintiff,
vs.	
Ezra Kulko,	Defendant.

[Filed Feb. 5, 1976]

COMPLAINT TO ESTABLISH FOREIGN JUDGMENT OF DI-
VORCE AND FOR MODIFICATION OF FOREIGN JUDG-
MENT AS ESTABLISHED TO AWARD CUSTODY OF
MINOR CHILDREN TO PLAINTIFF AND TO INCREASE
CHILD SUPPORT PAYMENTS: REQUEST FOR ORDER
FOR TEMPORARY CUSTODY AND RESTRAINING ORDER

Plaintiff alleges as follows:

I

Plaintiff is now and since January 1972 has been
a resident of the City and County of San Francisco,
State of California.

II

Defendant is a resident of New York City, County
of New York, State of New York.

III

Plaintiff and defendant intermarried on July 29, 1959 at San Francisco, California.

IV

There are two children of said marriage, whose names and birthdates are as follows: Darwin Kulko, born June 23, 1961 and Ilsa Kulko, born July 10, 1962.

V

On September 19, 1972 plaintiff and defendant entered into an Agreement which settled their support rights, provided for split custody of the minor children, provided for support of the minor children when they were in plaintiff's custody, and provided that defendant would pay all expenses for the children's education, clothing and medical, hospital and dental expenses. A copy of said agreement is attached hereto as Exhibit "A" and made a part hereof.

VI

On September 25, 1972 plaintiff was granted a decree of divorce from defendant in the Republic of Haiti, Civil Court of Port-au-Prince. A copy of said decree is attached hereto as Exhibit "B" and made a part hereof. By its terms, said decree incorporates by reference said agreement.

VII

Under the terms of said Agreement, the two minor children were to live with defendant while attending school and with plaintiff during the summer, Christ-

mas and Easter holidays; defendant was ordered to pay to plaintiff the sum of \$3,000.00 per year for the support of said minor children when residing with plaintiff and said sum was not broken down as to how much was for each child.

VIII

Since the execution of said agreement on September 19, 1972 and the granting of the decree on September 25, 1972, circumstances have changed in the following manner:

(1) Darwin has come to live full time with plaintiff and is in the actual physical custody of plaintiff and has been in her actual physical custody since January 1976.

(2) Ilsa has come to live full time with plaintiff and is in the actual physical custody of plaintiff and has been in her actual physical custody since December 1974.

(3) Plaintiff's expenses for said children have increased since she has their full time care, custody and control.

Because of said changed circumstances, it is therefore necessary for the Court to modify this decree upon its establishment as a California judgment to award custody of said minor children to plaintiff and to increase the amount of child support.

IX

Plaintiff needs and defendant has the ability to pay reasonable attorney fees and costs for this proceeding.

X

Both minor children are enrolled in private schools in the San Francisco area and their educational and psychological needs are being met under their present living arrangements.

Plaintiff is informed and believes, and upon such information and belief, alleges that defendant has threatened to remove said children from the State of California and from the custody of plaintiff without any regard for the traumatic and detrimental effect which said action would have on said children and on their future psychological and emotional well-being.

It is, therefore, necessary that the above entitled Court issue its order restraining defendant from removing said minor children from the home of petitioner and from the State of California during the pendency of this action and until the final determination of this action and, further, that plaintiff be granted temporary custody of said minors during the pendency of this action.

XI

It is in the best interests of said minor children that custody be awarded to plaintiff since said chil-

dren are in her actual custody and she is able to provide the attention and care that they need.

WHEREFORE, Plaintiff prays:

1. That the Divorce Decree between the parties heretofore entered by the Civil Court of Port-au-Prince be established as a California judgment.

2. That both parties be ordered to comply with all the provisions of said judgment, save and except those provisions hereinafter modified by this Court.

3. That said Decree and the provisions therein regarding custody be modified to award permanent custody of the minor children to plaintiff.

4. That said Decree and the provisions therein for the support of the minor children be modified and increased and defendant ordered to pay a reasonable amount of monthly support for each child.

5. That temporary custody of said minor children be awarded to plaintiff during the pendency of this action.

6. That defendant be restrained during the pendency of this action and permanently thereafter from removing said minor children from the home of plaintiff and from the State of California and that if defendant should attempt to remove said minors, plaintiff shall notify any peace officer, and said peace officer is ordered to enforce said order of this court.

7. That plaintiff be awarded reasonable attorney fees and costs for this proceeding.

8. For such other and further relief as this Court may deem proper.

Dated: February 4, 1976.

Schapiro and Thorn, Inc.
By Suzie S. Thorn
Attorneys for Plaintiff

[Verification Omitted in Printing]

Exhibit "A"

AGREEMENT, made this 19th day of September, 1972, by and between SHARON KULKO (hereinafter referred to as the "Wife") residing at 2299 Sacramento, San Francisco, California, and EZRA KULKO (hereinafter referred to as the "Husband"), residing at 7 West 96th Street, Borough of Manhattan, City and State of New York.

WITNESSETH:

WHEREAS, the parties hereto were married to each other in San Francisco, California, on July 29, 1959; following which they resided together as husband and wife in the County, City and State of New York; and

WHEREAS, there have been two children born of said marriage, to wit: DARWIN KULKO, born June 23, 1961, and ILSA LEE KULKO, born July 10, 1962; and

WHEREAS, in consequence of disputes and unhappy differences, the parties hereto have separated

and agreed to live separate and apart during their natural lives;

NOW, THEREFORE, for and in consideration of the mutual covenants, conditions and promises hereinafter contained, the parties hereto do hereby mutually agree as follows:

FIRST: It shall be lawful for the parties hereto at all times to live and continue to live separate and apart. Each shall be free from interference, authority and control, direct or indirect, by the other as fully as if he or she were sole and unmarried. Each may, for his or her separate use and benefit, conduct, carry on and engage in any business, profession or employment which to him or her may seem advisable.

SECOND: Neither of the parties hereto shall annoy or molest the other, nor compel or endeavor to compel the other to cohabit or dwell with him or her by any legal or other proceeding for restoration of conjugal rights or otherwise.

THIRD: The parties hereto hereby agree to the following with respect to the care, custody and control of the aforementioned children of their marriage:

1. That during the period of the year when the children are attending school, said children shall reside with and remain in the care, custody and control of the Husband.

2. That during the summer months of mid-June, July, August and mid-September, and during Christmas and Easter vacation weeks, said children shall

reside with and remain in the care, custody and control of the Wife.

3. That during such times as the children are in the care, custody and control of the Husband, the Wife shall have full and unlimited rights of visitation with said children.

FOURTH: The Husband hereby agrees to pay to the Wife the sum of \$3,000.00 annually for the support and maintenance of their said children during the aforementioned periods when said children reside with and are in the care, custody and control of the Wife. Said sum shall be paid bi-monthly, at the rate of \$500.00, beginning on December 1, 1972, and continuing on the first day of each second month thereafter until such time as said children have attained their majority. Said payments shall be mailed to the Wife at 2299 Sacramento, San Francisco, California, or at any other address which the Wife may designate from time to time in writing. The Husband further agrees that he will be responsible for and will pay all obligations incurred on behalf of said children for the following:

1. Education
2. Clothing
3. Medical, hospital and dental expenses

FIFTH: The Wife states that she is self-supporting and hereby waives any claim for support and maintenance from the Husband.

SIXTH: Each of the parties hereto shall promptly notify the other party in the event of serious illness or injury of either of the children. Serious illness or injury shall mean such illness or injury as confines a child to bed for more than three (3) days, or for which a child has been hospitalized.

SEVENTH: This agreement shall not be a bar to any action for divorce by either of the parties hereto against the other, but in the event that either of said parties shall at any time hereafter obtain a decree of divorce against the other, then this agreement shall be submitted to the Court wherein the action for divorce is instituted for approval and shall thereupon be incorporated in such judgment of divorce by reference but shall not be merged therein and shall survive any decree.

EIGHTH: The Husband hereby agrees to indemnify and hold the Wife harmless from any and all attorney fees, costs and expenses which she may incur by reason of the default of the Husband in the performance of any of the obligations required to be performed by him pursuant to the terms and conditions of this agreement.

NINTH: The parties hereto acknowledge that each of them is making this agreement of his and her own free will and volition, that each has had the benefit of his and her own independent legal counsel, and that no coercion, force, pressure or undue influence has been used against either party in the making of this agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

/s/ Sharon Kulko
Sharon Kulko

/s/ Ezra Kulko
Ezra Kulko

[Jurat Omitted in Printing]

Exhibit "B"

EQUALITY REPUBLIC OF HAITI

DIVORCE DECREE OF

Sharon Kulko	Plaintiff,
	against
Ezra Kulko	Defendant.

In the year nineteen hundred seventy-two, 169th year of Independence, and on September 25, at ten o'clock in the morning.

We, ERNEST LOUIS CHARLES, Municipal Officer for the West Section of Port-au-Prince, under-signed.

Having seen the documents signified to us by act of the bailiff, ALBERT HALL, of the Civil Court of Port-au-Prince, upon request of: MRS. SHARON KULKO, the plaintiff, living and domiciled at 2299 Sacramento, San Francisco, California, having for mandatary and lawyer of the jurisdiction of Port-au-Prince, MR. MICHEL D. DONATIEN, whose office is located in Port-au-Prince, Place Geffrard No. 17, filing a divorce action against her husband, MR. EZRA KULKO, the defendant, living and domiciled at: New York City, New York, represented by his mandatary and lawyer, MR. MARC L. RAYMOND of the jurisdiction of Port-au-Prince, in conformity with Article nine of the law of June 28, 1971.

Certify to have transcribed in our records the decisions of the judgment rendered by the Civil Court of this Jurisdiction between the parties, on September 21, 1972 as follows:

FOR THESE REASONS: The Court having received and considered the request for divorce filed by the plaintiff, who appeared in person in Court on September 21, 1972, the Power of Attorney and submission to jurisdiction filed by the defendant, and both parties being duly represented by counsel of their own choice in Court, the Court is of the opinion that it has jurisdiction of the parties and of the cause of action by virtue of Articles 1 and 2 of the Divorce Law of Haiti as amended on June 28, 1971, and that the plaintiff is entitled to the relief requested in the petition for divorce.

Says, (ORDERED) that the matrimonial links existing between the plaintiff and the defendant established by their marriage celebrated on July 29, 1959 at San Francisco, California ARE DISSOLVED; that the said MRS. SHARON KULKO, IS AND REMAINS DIVORCED from the said MR. EZRA KULKO upon the ground of incompatibility of character.

Says that the Separation Agreement executed between the parties on September 19, 1972 at New York City, New York is incorporated in the present judgment with the same force and effect as if it were reproduced in its entirety without being destroyed by the fact of its incorporation so that both parties have

to comply with their respective obligations contained in it.

Says that the minor children of the parties: DARWIN and ILSA LEE KULKO WILL STAY IN THE JOINT CUSTODY OF THE FATHER AND MOTHER according to the terms of the Separation Agreement.

Decides as it herein appears and pronounced by us, THEOPHILE JEAN FRANCOIS, Judge in Public and Civil audience on this day of September 21, 1972, in the presence of MR. HYPPOLITE THERMITUS, Deputy of the Commissary of the Government of this Jurisdiction, with the assistance of MR. ASCENCIO JUMELL, Clerk of the Court. In testimony thereof, we have drawn and signed this decree at our office located in Port-au-Prince, Haiti, Carrefour. Receipt of the General Administration of taxes under No. 43858-JJ.

SIGNED: ERNEST LOUIS CHARLES

SEAL

I, Christiane Manoukian, hereby certify that I am fully conversant with both French and English languages, and that the above is a true and correct translation from the original French of the Divorce of MRS. SHARON KULKO from her husband MR. EZRA KULKO.

/s/ Christiane Manoukian

Insert name of court, judicial district or branch court, if any, and Post Office and Street Address:

City Hall
400 Van Ness Avenue
San Francisco, Calif. 94102

(Title Omitted In Printing)

[Filed Mar. 1, 1976]

SUMMONS

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

AVISO! Usted ha sido demandado. El Tribunal puede decidir contra Ud. sin audiencia a menos que Ud. responda dentro de 30 días. Lea la información que sigue.

1. TO THE DEFENDANT: A civil complaint has been filed by the plaintiff against you. (See footnote)

- a. If you wish to defend this lawsuit, you must within 30 days after this summons is served on you, file with this court a written pleading in response to the complaint (if a Justice Court, you must file with the court a written pleading or cause an oral pleading to be entered in the docket in response to the complaint, within 30 days after this summons is served on you).
- b. Unless you so respond, your default will be entered upon application of the plaintiff and

this court may enter a judgment against you for the relief demanded in the complaint, which could result in garnishment of wages, taking of money or property or other relief requested in the complaint.

- c. If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be filed on time.

Dated: February 5, 1976

(SEAL) Carl M. Olsen, Clerk

By Richard F. Metter, Deputy

2. ☐ NOTICE TO THE PERSON SERVED:

You are served

- a. ☐ As an individual defendant.
- b. ☐ As the person sued under the fictitious name of:
- c. ☐ On the behalf of:

- Under: ☐ CCP 416.10 (Corporation)
☐ CCP 416.20 (Defunct Corporation)
☐ CCP 416.40 (Association or Partnership)
☐ Other:
☐ CCP 416.60 (Minor)
☐ CCP 416.70 (Incompetent)
☐ CCP 416.90 (Individual)

Superior Court of the State of California
for the City and County of San Francisco

(Title Omitted In Printing)

RELIABLE PROCESS SERVICE
AFFIDAVIT OF SERVICE AND
AFFIDAVIT OF INVESTIGATION UNDER SOLDIERS'
AND SAILORS' CIVIL RELIEF ACT

State of New York

County of Kings

Stan E. Gaddy being duly sworn deposes and says: I reside at 731 Hancock Street, Bklyn, New York City, that on the 23rd day of February, 1976, at No. 515 Madison Avenue, Borough of Manhattan, City of New York, I served the within summons upon Ezra Kulko, Male, White, 37 years, 5'6 150 lbs., brown hair at 12 noon, the defendant in this action by delivering to and leaving a true copy of said summons with said defendant personally. I further state that I knew the person so served as aforesaid to be the same person mentioned and described in the said summons and as the defendant in this action.

I am over the age of 21 years and not a party to the action.

I asked him whether he was in the service of the United States Government in any capacity whatever. He told me he was not. He was clad in ordinary civilian clothes and wore no uniform of any kind. Upon information and belief I aver that the defend-

ant is not in the military service of the United States at the present time as that term is used in the Act of Congress known as "The Soldiers and Sailors Civil Relief Act." The sources of my information and the grounds of my belief are the conversations above narrated.

That the said defendant is not in the Military Service of any country allied with this nation in the conduct of the present war, nor has the said defendant received notice of induction into the armed forces of the United States.

Sworn to before me this 24th
day of February, 1976

(Seal) Moe Korenman

Notary Public, State of New York,
No. 24-7338700 Qual. In Kings Co.,
Commission Expires March 30, 1976

Stan E. Gaddy
License # 743405

Superior Court of California,
County of San Francisco

(Title Omitted In Printing)

[Filed Apr. 1, 1976]

NOTICE OF MOTION (MARRIAGE)
TO QUASH SERVICE OF SUMMONS FOR
LACK OF PERSONAL JURISDICTION
(UNDER RULE 1234)

TO: Plaintiff, SHARON KULKO HORN, and to
SUZIE S. THORN, her attorney at law

Notice is given that Defendant, EZRA KULKO, will move this court, located at City Hall, San Francisco, California on April 15, 1976 at 9:30 a.m., Department or Room No. Law and Motion for certain orders as set forth in the attached REQUEST FOR ORDER AND DECLARATION, to which is attached:

Memorandum of Points and Authorities

Dated, March 31, 1976

/s/ Lawrence H. Stotter,
Attorney for Defendant

(Title Omitted In Printing)

REQUEST FOR ORDER AND
DECLARATION IN SUPPORT OF

☐ ORDER TO SHOW CAUSE

☒ NOTICE OF MOTION

(OMITTED)

* * * * *

** INJUNCTIVE/OTHER ORDER. I request an injunctive or other order as set forth on the reverse.

Moving party, herein named as defendant and specially appearing for all purposes of this motion, moves the Court for an order quashing service of summons on him.

The motion will be made on the ground that this Court lacks personal jurisdiction over him in that he is a nonresident who does not have sufficient contact with California to satisfy due process requirements.

DECLARATION OF LAWRENCE H. STOTTER

I declare that I am an attorney, licensed to practice law in the State of California, and that I represent the defendant in this action filed by plaintiff to establish a foreign judgment of divorce and for modification to award child custody to plaintiff and increase child support, in his special appearance to quash service.

I declare on information and belief that defendant does not have "minimum contacts" with the State of

California. That he has continuously been a resident of the State of New York. That plaintiff obtained a divorce in Haiti, based on a separation agreement drawn and executed in New York, which agreement set forth that the children would reside with him during the school year in New York. The children were born in New York. Both children lived in New York, until without the consent of their father, their mother induced them to stay with her. The youngest child ran away from home in New York in January 1976, aided by a plane ticket sent to him by his mother. That defendant has no business or professional contacts with the State of California. That based on the foregoing facts, the Court lacks personal jurisdiction over the moving party and service of summons on him should be quashed.

I declare under penalty of perjury that the foregoing, including any attachments, is true and correct and that this declaration was executed on March 21, 1976 at San Francisco, California.

/s/ Lawrence H. Stotter
Lawrence H. Stotter
Attorney for Defendant

In the Superior Court of the State of California
in and for the City and County of San Francisco

(Title Omitted In Printing)

[Filed May 6, 1976]

DECLARATION IN SUPPORT OF MOTION
TO QUASH SERVICE OF SUMMONS

I, LAWRENCE H. STOTTER, under penalty of perjury declare that:

(1) That I am the attorney of record for Defendant, EZRA KULKO, a resident of New York State.

(2) That I have previously filed herein on April 1, 1976, a Motion to Quash Service of Summons For Lack of Personal Jurisdiction by way of special appearance.

(3) That in further support of said Motion, I attach herewith as Exhibits A and B respectively, affidavits of EZRA KULKO executed on April 28, 1976, which further support the contentions of my Motion that (a) there exists no contacts between the State of California and EZRA KULKO to warrant the exercise of personal jurisdiction by this Court and (b) that the home state and proper place of litigation of any custody proceedings relative to the

two minor children of the parties belongs in the State of New York, rather than California.

Dated: May 4, 1976.

Respectfully submitted,
Stern, Stotter & O'Brien
By Lawrence H. Stotter
Lawrence H. Stotter

Exhibit "A"
Superior Court of California
County of San Francisco

(Title Omitted In Printing)

AFFIDAVIT IN SUPPORT OF MOTION
TO QUASH SERVICE OF SUMMONS

State of New York
County of New York—ss.:

EZRA KULKO, being duly sworn, deposes and says:

I am the defendant in the above-entitled action and make this affidavit in support of the motion to quash service of the summons for lack of personal jurisdiction and for that limited and special purpose only.

I have had very limited contact with the State of California. Specifically, I have been there only twice in my lifetime. Both times it was purely as an incident to my military service while serving in the armed

forces. My first contact with the State of California was on July 29, 1959, while en route to Korea. I left California for Korea on August 2, 1959. On July 29, 1959, I was married in California, but the marriage took place there only because it was a convenient stop-over between Fort Sam Houston in San Antonio, Texas, where I was stationed at the time, and Korea via Oakland Army Terminal, from whence I debarked for Korea. As a matter of fact, my wife was not then a resident of the State of California. She was a resident at the time of New York City, New York. She merely met me in California so that we might be married while I was en route to Korea.

Apart from the period from July 29, 1959, to August 2, 1959, which I have mentioned above, my only other contact with the State of California was on August 13 and August 14, 1960. Actually, my presence in California on those two days totaled only about 24 hours. I arrived in California late in the day on August 13, 1960, and left for New York City, New York, on August 14, 1960. This short stopover was also incidental to my military service. It was merely a stopover from Korea en route back to New York. The plaintiff was not in California at that time either. She was in New York City. As a matter of fact, from the time I met her in California on July 29, 1959, to get married until March of 1972, she was a resident of New York City, New York, with the exception of a period of six months from October 1960, to May of 1961, when she resided with me in Fort Monmouth, New Jersey, which was my military station at that time.

I have never been a resident of the State of California and have spent only the three or four days mentioned above in that State. I am and always have been a resident of the State of New York, with the exception of my military stations in Korea, Fort Monmouth, New Jersey and San Antonio, Texas. As a matter of fact, the plaintiff has always resided with me as husband and wife in the City of New York, New York, with the exception of our stay while I was in the military service in Fort Monmouth, New Jersey. She was a resident of New York City, New York, prior to our marriage on July 29, 1959, during our marriage, and after our separation. It was not until sometime after we separated that she moved to California. Even at that time, although she went to live in California, both children were left to reside with me in New York City, New York, pursuant to the terms of our Separation Agreement. Our daughter was not taken to California by the plaintiff until the Christmas-New Year holiday of 1974-1975. Our son remained with me in New York City, New York, until January of 1976, when plaintiff induced the child to come to her in California and sent him a plane ticket for that purpose.

/s/ Ezra Kulko
Ezra Kulko

[Jurat Omitted in Printing]

Exhibit "B"
Superior Court of California
County of San Francisco

(Title Omitted In Printing)

AFFIDAVIT IN SUPPORT OF MOTION TO
QUASH SERVICE OF SUMMONS

State of New York
County of New York—ss.:

EZRA KULKO, being duly sworn, deposes and says:

1. I am the defendant in the above-entitled action and make this affidavit in support of the motion to quash service of the summons for lack of personal jurisdiction and for that limited and special purpose only.

2. At the time that the separation occurred between plaintiff and me, in March of 1972, I was residing at 7 West 96th Street, New York City, New York, along with our two children, then aged 10 and 11. Plaintiff's and my home and residence, as well as that of our children, were in New York City, New York, for the 13 years next preceding our separation. During that period we lived at the following addresses for approximately the following periods: June, 1959, to September, 1963, at 110 West 96th Street, New York City, New York; September, 1963, to September, 1965, at 444 Central Park West, New York City,

New York. From September, 1965, to the present, I have lived at 7 West 96th Street, New York City, New York. Plaintiff lived with me at that address until our separation.

3. After our separation I continued to live with our two children at 7 West 96th Street, New York City, New York. At that time plaintiff took up residence with her present husband at 2299 Sacramento, San Francisco, California. Thereafter she married her present husband and took up residence with him at 455 Marina Boulevard, San Francisco, California.

4. Plaintiff retained a New York attorney with whom I negotiated a settlement of our marital rights and obligations. I was not represented by an attorney. I acted in my own behalf. These negotiations resulted in the execution of a Marital Settlement Agreement on September 19, 1972. The Agreement was negotiated entirely in New York City between me and plaintiff's attorney, Elmer Drier. Plaintiff was in New York City at the time the Agreement was executed. It was signed by both of us in New York City, New York.

5. Directly after September 19, 1972, when the Separation Agreement was executed by both of us, plaintiff went to Haiti and there obtained a Decree of Divorce on September 25, 1972. The Decree was a bilateral one. I gave plaintiff an executed power of attorney at the time she left for Haiti. Thereafter plaintiff returned to San Francisco, California, where she took up her present residence with her present husband. At that time my marital residence continued

to be at 7 West 96th Street, New York City, New York, where I continued to live with the two children of our marriage.

6. In December, 1973, our son Darwin (born June 23, 1961) and our daughter Ilsa (born July 10, 1962) were spending Christmas vacation with plaintiff. Without my knowledge or consent, and in violation of our Agreement and the Decree of Divorce, plaintiff induced Darwin and Ilsa to remain with her at the end of the vacation period rather than return to my residence in New York City, New York. Thereafter I prevailed upon plaintiff's relatives to induce plaintiff to return the children to me at my home in New York City. Plaintiff did so, and the children returned to me in January of 1974.

7. In January, 1974, without my consent and without any prior discussion between plaintiff and me, and in violation of our Separation Agreement and the Decree of Divorce which incorporated that Agreement, plaintiff induced our daughter Ilsa to leave her brother and our home in New York City, New York, and to join plaintiff in San Francisco. Ilsa has remained there to the present time in continuing violation of our Separation Agreement and the Decree of Divorce which plaintiff procured in Haiti.

8. On January 12, 1976, plaintiff, again without my knowledge or consent and in violation of our Agreement and the Decree of Divorce, caused our son to leave our home in New York City and go to plaintiff's home in San Francisco. Plaintiff sent our son a plane ticket and apparently entered into a

conspiracy with him to leave our home in New York City without my knowledge. On January 12, 1976, he left our home, so far as I knew to take an examination at school, and instead boarded a plane and went on to San Francisco. He has remained in San Francisco until the present time. He has called me but once, and that was on January 13, 1976.

9. The fact of the matter is, and it is my position, that my two children have their residence with me in New York City, New York, where they had lived with me all of their lives until their improper removal by plaintiff.

10. The home State of my children is New York. They never lived anywhere else until plaintiff spirited them away. By Agreement prepared by plaintiff's own attorney in New York and executed by plaintiff in New York, plaintiff fixed the custody of the children with me in New York. Were it not for plaintiff's machinations, the children would have continued in residence with me in New York City.

11. I have paid plaintiff all sums which are required of me for the support of the children pursuant to the terms of the Separation Agreement between us and the Decree of Divorce. I am not in default under the terms of either that Decree or that Agreement. However, I refused and still refuse to make additional payments demanded by plaintiff, because I want my children returned to my home. I want them in New York with me, where they belong, and not in the State of California, where plaintiff holds them in violation of her commitments to me, in viola-

tion of the Agreement between us drawn by her own attorney, and in violation of the Decree of Divorce which she procured.

/s/ Ezra Kulko
Ezra Kulko

[Jurat Omitted in Printing]

Superior Court of the State of California for
the City and County of San Francisco

(Title Omitted In Printing)

[Filed May 10, 1976]

AFFIDAVIT IN OPPOSITION TO MOTION TO
QUASH SERVICE OF SUMMONS

I, SHARON KULKO HORN, say:

1. In 1973, both Ilsa and Darwin were sent to San Francisco and sent back to New York in accordance with the agreement. They used tickets which defendant had provided with dates of flights provided by him.

2. In December 1973, Ilsa told her father before she left for Christmas vacation that she wanted to live with her mother now. Ilsa brought all her clothing with her and defendant bought her a one-way ticket only. Since that time, Ilsa has spent the summers of 1974 and 1975 in New York visiting her father, and he has always bought the return tickets for her to come back to San Francisco.

3. Darwin told me for a period of time that he wanted to live with me. After 1975 Christmas vacation, on or about January 10, 1976, Darwin called me and said he was in trouble, his father didn't want him and he wanted to come to San Francisco to live. As a result of that conversation, I sent him a plane ticket and left it at TWA. I told Darwin to think it over during school—he did and went to TWA and

came out here. I called defendant to tell him what was happening.

Defendant contacted Social Services in San Francisco, and a representative contacted me and Ilsa and Darwin, and reported to defendant that they were in school and well adjusted. Everything was fine.

4. Defendant has *not* paid all sums due and owing for child support; for five years he has paid \$2,100.00 and owes approximately \$12,900.00 under the support agreement and order.

5. At *no time* has defendant taken any legal steps in this matter in any Court, in New York or anywhere else. The first legal steps were the filing of this complaint to establish a foreign divorce and modify custody, which I filed on February 5, 1976.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 7, 1976, at San Francisco, Calif.

/s/ Sharon Kulko Horn

In the Court of Appeal
First Appellate District

Ezra Kulko,	Petitioner,
vs.	
Superior Court of the State of California for the City and County of San Francisco,	Respondent.
Sharon Kulko Horn,	Real Party in Interest.

[Filed June 16, 1976]

PETITION FOR WRIT OF MANDATE WITH
MEMORANDUM OF POINTS AND AUTHORITIES

To the Honorable Presiding Justice and Associate
Justices of the Court of Appeal:

Petitioner, EZRA KULKO, respectfully alleges:

I

Petitioner, EZRA KULKO, is named defendant in an action commenced in respondent court, entitled *Sharon Kulko Horn v. Ezra Kulko*, Superior Court No. 701 626 (Exhibit 1). The plaintiff in that action is named in this petition as real party in interest.

II

On or about February 5, 1976, SHARON KULKO HORN, real party in interest herein, filed an action

against EZRA KULKO, petitioner herein, in the Superior Court for the City and County of San Francisco entitled COMPLAINT TO ESTABLISH FOREIGN JUDGMENT OF DIVORCE AND FOR MODIFICATION OF FOREIGN JUDGMENT AS ESTABLISHED TO AWARD CUSTODY OF MINOR CHILDREN TO PLAINTIFF AND TO INCREASE CHILD SUPPORT PAYMENTS: REQUEST FOR ORDER FOR TEMPORARY CUSTODY AND RESTRAINING ORDER to which was attached an AGREEMENT, dated September 19, 1972, between SHARON KULKO and EZRA KULKO, and a DIVORCE DECREE, dated September 25, 1972, from the Republic of Haiti (Exhibit 1). Based on Mrs. Horn's verified complaint the respondent Court issued on that same date an ORDER FOR CUSTODY AND RESTRAINING ORDER PENDING HEARING (Exhibit 2). On February 23, 1976, EZRA KULKO, petitioner herein, was served with the copies of the foregoing pleading and order in New York.

By agreement between counsel, time to answer was kept open and on April 1, 1976, EZRA KULKO, petitioner herein, specially appeared through counsel and filed his NOTICE OF MOTION (MARRIAGE) TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION (UNDER RULE 1234) with MEMORANDUM OF POINTS AND AUTHORITIES (Exhibits 3(a) and (b)), and hearing was set on said motion on April 15, 1976. The hearing was continued from April 15,

1976, to April 22, 1976, by agreement of counsel. At the request of the Court, the matter was continued from April 22, 1976, to May 10, 1976, for special hearing.

On May 6, 1976, EZRA KULKO, petitioner herein filed counsel's DECLARATION IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS, to which was attached two affidavits of EZRA KULKO (Exhibits 4, 4(a), and 4(b)), and FURTHER POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS (Exhibit 5).

On May 7, 1976, counsel for petitioner, EZRA KULKO, received from real party in interest, SHARON KULKO HORN, copies of pleadings entitled AFFIDAVIT IN OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS, AND PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS (Exhibits 6(a) and 6(b)).

On May 10, 1976, The Motion to Quash Service for Lack of Personal Jurisdiction was heard before the Honorable S. Lee Vavuris, counsel for EZRA KULKO making a special appearance, and submitted.

Respondent court denied Petitioner's Motion to Quash Service and Summons on May 17, 1976, and petitioner received respondent court's Minute Order on May 18, 1976 (Exhibit 7).

On May 26, 1976, respondent court for good cause shown, extended time for petitioner to file his Writ of Mandate to and including June 16, 1976, on petitioner's application therefor (Exhibit 8).

The basis of petitioner's motion to quash service for lack of personal jurisdiction was that petitioner had never been a resident of the State of California and that there have not been the required "minimal contacts" with the state by petitioner. Petitioner is, and has always been a resident of the State of New York with the exception of his military service in Korea, Fort Monmouth, New Jersey, and San Antonio, Texas. Prior to their marriage, and during it until the time of their separation, petitioner's former wife and the real party in interest herein was a resident of the State of New York. They met in California as petitioner was on his way to Korea and were married in California during a three-day stop-over. The separation agreement was drawn and executed in New York. Real party in interest obtained a divorce in the Republic of Haiti based on the New York separation agreement. Petitioner has no business or professional contacts with the State of California.

As set forth in the attached pleadings, petitioner does not challenge the subject matter of the action. Petitioner made a special appearance to challenge the jurisdiction of the respondent court over him *in personam*.

III

The order of respondent court entered May 17, 1976, denying petitioner's motion to quash service of

summons (Exhibit 8) is in excess of the jurisdiction of respondent court, and in violation of constitutional, statutory and precedential limitations on its jurisdiction, in that it violates petitioner's right to due process in that he is not afforded a reasonable opportunity to be heard:

(a) California Code of Civil Procedure §410.10:

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"

(b) Article V, Constitution of the United States:

"nor shall any person . . . be deprived of life, liberty, or property, without due process of law;"

(c) Precedential law setting forth constitution limitations on jurisdiction:

Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565;

Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278;

International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95;

Titus v. Superior Court of the State of California, in and for the County of Contra Costa, 23 Cal.App.3d 792, 100 Cal.Rptr. 477 (1972);

Inselberg v. Inselberg, 128 Cal.Rptr. 578 (1976).

IV

Petitioner's form of remedy, under California Rules of Court 1234, is to serve and file a notice of motion to quash the service of summons upon the ground

of lack of jurisdiction of the court over him or a notice of the filing of a petition for writ of mandate under the circumstances and in the manner provided by California Code of Civil Procedure §418.10. Said Section 418.10 provides for petitioning an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons. Petitioner has complied with Rule 1234 and C.C.C.P. §418.10.

V

WHEREFORE, petitioner prays that:

1. An alternate writ of mandate issue under the seal of this court commanding respondent and real party in interest to show cause before this court, at a time and place then or thereafter specified by court order, why respondent court should not be commanded to vacate its order of denial and to enter its order granting petitioner's motion to quash service of summons for lack of personal jurisdiction in the action of *Horn v. Kulko*, San Francisco Superior Court No. 701 626.

2. That, on the hearing of this petition, this court issue its peremptory writ of mandate compelling respondent court to vacate its order of denial and to enter its order granting petitioner's motion to quash service of summons for lack of personal jurisdiction.

Dated, June 15, 1976

Stern, Stotter & O'Brien

By Lawrence H. Stotter

Lawrence H. Stotter

Attorneys for Petitioner

Court of Appeal of the State of California
for the First Appellate District

DIVISION FOUR

(Title Omitted In Printing)

[Filed September 2, 1976]

RETURN OF SHARON KULKO HORN, REAL PARTY IN
INTEREST BY WAY OF VERIFIED ANSWER TO
ALTERNATIVE WRIT OF MANDATE

Real party in interest, hereinafter called "RP" answers the alternative writ of mandate issued herein and petitioner's petition for writ of mandate as follows.

I

This is an action to establish foreign judgment of divorce and for modification of foreign judgment as established, to award custody of minor children to RP, SHARON KULKO HORN, and to increase child support payments.

II

Petitioner and RP were married on July 29, 1959 in San Francisco, California, and are the parents of two minor children, DARWIN ~~HORN~~ KULKO, born June 23, 1961, and ILSA ~~HORN~~ KULKO, born July 10, 1962.

III

On September 19, 1972, petitioner and RP entered into an agreement, copy of which is attached to the Complaint in this action. (Said complaint is Exhibit 1 in petitioner's petition for writ of mandate filed herein, and any further references herein to exhibits are to those attached to said petition, except as otherwise stated.)

In that agreement, it is provided in THIRD

1. "During the period of the year when the children are attending school, said children shall reside with and remain in the care, custody, and control of the husband."

2. "That during the summer months of mid-June, July, August, and mid-September, and during Christmas and Easter vacation weeks said children shall reside with and remain in the care, custody, and control of the wife. The agreement also provides for the payment by the husband of child support. The agreement specifically shows that R.P. 'resides at 2299 Sacramento, San Francisco, California.'"

IV

On September 25, 1972, a divorce was granted to RP in the Republic of Haiti. (Copy of the decree is attached to Exhibit 1.)

Petitioner gave RP an executed power of attorney at the time she left for Haiti.

V

Both children are now living with RP in San Francisco, California.

In 1973 both Ilsa and Darwin were sent to San Francisco and sent back to New York in accordance with the agreement, using tickets which petitioner had provided with dates of flights provided by him.

In December 1973 Ilsa told her father before she left for Christmas vacation that she wanted to live with her mother now. She brought all her clothing with her and petitioner bought her a one-way ticket only. Since that time, Ilsa has spent the summers of 1974 and 1975 and visited with her father, and he has always bought the return tickets for her to come back to San Francisco.

VI

For some time Darwin told RP that he wanted to live with her. After the 1975 Christmas vacation and on or about January 10, 1976, Darwin called RP stating that he was in trouble, his father did not want him, and he wanted to come to San Francisco to live. As a result of that conversation, RP sent Darwin a plane ticket and told him to think it over, which he did, and he came to San Francisco, using that ticket. RP called petitioner to tell him what was happening. Petitioner contacted Social Services in San Francisco and their representatives contacted RP and Ilsa and Darwin and reported to petitioner that they were in school and well adjusted and everything was fine.

In this connection, petitioner wrote RP a letter regarding Darwin's going to California to live with her. A copy of that letter was introduced in evidence in the lower court, and a copy is attached hereto and marked "Exhibit A."

VII

Petitioner has not taken any legal steps regarding custody or support of his children in any court in New York or elsewhere.

* * *

WHEREFORE, RP prays that the petition for writ of mandate be denied.

Dated: August 31, 1976.

Schapiro and Thorn, Inc.

By Suzie S. Thorn

Attorneys for Real Party in Interest

Exhibit "A"

H. Justin Ross, D.D.S.

Ezra Kulko, D.D.S.

515 MADISON AVENUE

NEW YORK

—
ELDORADO 5-5885

Dear Sharon

Darwin has informed me of his intention of living with you. I am prepared to accept his decision. The only question in my mind is the way his decision was reached. He has become angry, belligerent [sic] & unlikeable. I can only attribute it to distortions of reality based upon information fed to him in a biased way. Because of this, my quiet, gentle, loveable child threatened me to do violence to Dominique.

I don't want a human being around me with this type of behavior pattern. You are welcome to it.

I would have hoped that our relationship was going to improve. I feel at this point it is unfeasable [sic].

I would like to renegotiate the original agreement with you in as much as it is invalidated.

I would like for you to present to me what you feel would be a fair and equitable arrangement.

I would like to do it without lawyers as you know how I feel about them.

As always,

/s/ Ezra

The opinion of the California Court of Appeal, First Appellate District, Division Four, has been printed in the Jurisdictional Statement, pages xix-xxii, and is designated therein as Appendix B. (References in the brief to this opinion are signified: J.S. App. B)

The opinion of the California Supreme Court, entered May 26, 1977, has been printed in the Jurisdictional Statement, pages i-xviii, and is designated therein as Appendix A. (References in the brief to this opinion are signified: J.S. App. A)

OCT 19 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977
No. 77-293

EZRA KULKO,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN
AND FOR THE CITY AND COUNTY OF SAN FRANCISCO;
and SHARON KULKO HORN,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION TO AFFIRM OR DISMISS APPEAL.

SUZIE S. THORN,
San Francisco, California,

JAMES E. SUTHERLAND,
P.O. Box 7888,
3711 Long Beach Boulevard, Suite 718,
Long Beach, Calif. 90807,
(213) 426-0425,

*Attorneys for Appellee,
Sharon Kulko Horn.*

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IN THE
Supreme Court of the United States

October Term, 1977
No. 77-293

EZRA KULKO,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN
AND FOR THE CITY AND COUNTY OF SAN FRANCISCO;
and SHARON KULKO HORN,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION TO AFFIRM OR DISMISS APPEAL.

Appellee, SHARON KULKO HORN, moves the Court to affirm the judgment of the California Supreme Court, or, alternatively, to dismiss the appeal for want of a substantial federal question.

Question Presented.

In an action to establish a Haitian divorce decree as a foreign judgment in California to enforce child support, is it reasonable for California to exercise personal jurisdiction over a father who is a New York resident when the divorce settlement agreement provided for part-time custody with the mother in California and for child support payable in California, and he

sent one child to live with her in California and allowed both children to live with her after having a California public agency investigate the care they were receiving?

Statement of the Case.*

Dr. Kulko and his wife agreed to obtain a divorce and entered into a written settlement agreement in 1972. At the time, as recited in the agreement, she lived in California and he lived in New York, where they respectively still reside. They agreed she would obtain a Haitian divorce, which she did. Until the present action, neither party has ever attempted to establish the foreign judgment in any state of the United States.

The agreement provided that Dr. Kulko would have custody of the two minor children in New York for nine months each year. Mrs. Kulko, now Horn, was to have legal *custody* of the children in California for three months each summer plus other holiday periods:

"The parties hereto hereby agree to the following with respect to the care, custody and control of the aforementioned children of their marriage:

1. That during the period of the year when the children are attending school, said children shall reside with and remain in the care, custody and control of the Husband.

**Matters of Form.* The interested parties are Dr. Kulko, appellant, and his former wife, now Mrs. Horn. They will be referred to as "Dr. Kulko" and "Mrs. Horn" or as the "father" and the "mother" of the minor children whose support is the subject of this action.

"J.S." refers to Appellant's Jurisdictional Statement.

"J.S., App." refers to the Appendix to Appellant's Jurisdictional Statement.

2. That during the summer months of mid-June, July, August and mid-September, and during Christmas and Easter vacation weeks, said children shall reside with and remain in the care, custody and control of the Wife.

3. That during such times as the children are in the care, custody and control of the Husband, the Wife shall have full and unlimited rights of visitation with said children."

While the children were in her custody in California, he was to pay \$3,000 per year child support, payable in San Francisco. As of the trial court hearing in this action, Dr. Kulko was in arrearages for child support under the agreement in the amount of \$12,900.

In December, 1973, the oldest child, the daughter then 11 years old, told her father she wanted to live with her mother in California. He bought her a one-way airplane ticket and she took all of her clothing with her. The daughter continued to live with her mother in California and still lives with her. Since moving, the daughter has returned to New York to visit her father during the summers of 1974 and 1975, returning to her mother each time via airplane tickets purchased by her father. The record does not show any attempt by the father to keep her in New York or to get her to return to live with him.

In January, 1976, the parties' son, then 14 years old, called his mother, said he was in trouble because his father no longer wanted him, and asked to live with her. She sent him an airplane ticket and he came to California without his father's knowledge.

After the son came to California, the father contacted the Department of Social Services of the City

of San Francisco and a representative contacted the mother and children and reported to the father. Dr. Kulko also wrote to Mrs. Horn:

"Dear Sharon

Darwin has informed me of his intention of living with you. I am prepared to accept his decision. The only question in my mind is the way his decision was reached. He has become angry, beligerent (sic) & unlikeable. I can only attribute it to distortion of reality based upon information fed to him in a biased way. Because of this, my quiet gentle loveable child threatened me to do violence to Dominique.

I don't want a human being around me with this type of behavior pattern. You are welcome to it.

I would have hoped that our relationship was going to improve. I feel at this point it is unfeasable (sic).

I would like to renegotiate the original agreement with you in as much as it is invalidated.

I would like for you to present to me what you feel would be a fair & equitable arrangement.

I would like to do without lawyers as you know how I feel about them.

As always
Ezra"

On February 25, 1976, Mrs. Horn filed a complaint to establish the Haitian judgment as a foreign judgment in California and to modify custody and child support. Dr. Kulko was served in New York in accordance with the California Code of Civil Procedure. He moved to quash service of process.

There is no claim that he was not served, or that the California rules are not calculated to give reasonable notice, or that the California rules were not followed.

Neither does he contest California's jurisdiction to determine child custody. He attacks the reasonableness of California's exercise of jurisdiction to award child support on the grounds he does not have minimum contacts with California.

The trial court resolved all facts necessary to find in personam jurisdiction in favor of the mother and children and against the father [J.S., App. A, p. ii, n. 1] and denied the motion. The California Supreme Court affirmed.

Dr. Kulko appeals.

ARGUMENT.

I

California Courts Have Jurisdiction Over the Father to Make a Valid Child Support Order.

A. His Exercise of Parental Discretion and Control Was Continuing Conduct Having an Effect in California in Addition to His Specific Acts Relating to California.

Dr. Kulko entered into an agreement contemplating part-time custody of the children in California, sent them there several times, sent his 11-year-old daughter to live permanently with her mother, and returned her to California after his summer custody periods. When his son came to California, the father used the services of a public agency to investigate the care the children were receiving, and decided to let them stay, writing the mother to that effect. These were specific acts having an effect in California, plainly using California facilities to raise his children; exercising continuous parental discretion, control, and responsibility to take advantage of California's "laws, institutions, and resources" [J.S., App. A, p. vii] for his children's benefit.

"(A) nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the non-resident parent for actions concerning the support of these children." [J.S., App. A, p. vii].

A parent must exercise judgment in the care of his children; that is the very purpose and meaning

of the "care, custody and control" given Dr. Kulko by the agreement and the divorce decree. He exercised that judgment. His decisions, alone, were purposeful acts having an effect in California.

The father's position is that he merely "passively submitted" [J.S., p. 18] when his daughter "announced her decision" [J.S., p. 22] to live in California. The notion that a father is an innocent bystander when an 11-year-old child decides where she will live is startling.

Not only is his proposition novel, it is contrary to law. No minor child can unilaterally decide which parent will have custody. The child's wishes may be considered, though one wonders how much weight will be given to an 11-year-old's opinion, but the final decision is up to the court, or to an agreement between the parents. *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281 (1974); *In re Marriage of Mehlmauer*, 60 Cal.App.3d 104, 131 Cal.Rptr. 325 (1976). Also, the aid of the California and New York courts was available to Dr. Kulko to establish a foreign divorce decree and enforce custody or to get help from the juvenile courts, if he needed help controlling his daughter. N.Y. Family Court Act, §712; *cf.*, *A. v. City of New York*, 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972); Cal. Welf. & Inst. Code, §601.

His allegedly passive role is belied by his conduct. The children's father should not be able to avoid a support order in the children's domicile because he now pretends to have abdicated his parental duties. He is directly responsible for the children now living in California, as the California Supreme Court determined.

B. The Holding Accords With Established Due Process Principles and Soundly Developing Long Arm Jurisdiction Standards in Domestic Relations Cases.

The applicable due process tests have been established by this Court and were recognized by the California Supreme Court [J.S., App. A, pp. v-vii]. The basic tests are the fairness and reasonableness of requiring the defendant to come to the forum state to litigate. Their application was correct.

First, the defendant must have minimal contacts with the forum state so that the action does not offend traditional notions of fair play and substantial justice. Then, it must be reasonable to require a defense in the forum, a test in which the balance of inconveniences plays a major role. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-317, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158-159 (1945). Jurisdiction may be based on a single event or transaction if it gives rise to the cause of action, *cf.*, *Id.*, at 317, or the defendant by some act avails himself of the privileges of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958).

The "quality and nature" of Dr. Kulko's activities in relation to California, deriving benefit and protection from California's laws, make it reasonable to require him to litigate child support in California, in the "fair and orderly administration" of justice. *International Shoe Co. v. Washington*, *supra*, 326 U.S. at 319, 90 L.Ed. at 104, 66 S.Ct. at 160.

Also, California has a manifest interest in protecting its residents, including the Kulko children. *Cf.*, *McGee v. International Life Insurance Co.*, 355 U.S. 220,

223, 2 L.Ed.2d 223, 226, 78 S.Ct. 199, 201 (1957). It is important to protect children from being stranded without support when parents try to avoid their obligations, and application of the minimum contacts approach is appropriate to domestic relations matters. Fathers should not be able to use long arm jurisdiction principles as a shield from their children.

Whitaker v. Whitaker, 237 Ga. 895, 230 S.E.2d 486 (1976);

Mizner v. Mizner, 84 Nev. 268, 270-71, 439 P.2d 679, 680-681, *cert. den.*, 393 U.S. 847 (1968);

Dillon v. Dillon, 46 Wis.2d 659, 671, 176 N.W.2d 362, 368 (1970);

Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 Columbia L. Rev. 289 (Feb. 1973);

Comment, *Domestic Relations: The Role of Long Arm Statutes*, 10 Washburn L.J. 487 (1971).

Just as it has been necessary to expand personal jurisdiction because commercial transactions cross state lines, *McGee v. International Life Insurance Co.*, *supra*, 355 U.S. at 222-223, 2 L.Ed.2d at 226, 78 S.Ct. at 201, it is necessary to expand jurisdiction in domestic relations cases because of increasing mobility. Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases*, 6 Texas Tech. L.Rev. 1021, 1023, n. 18, 1049, n. 172 (Spring 1975).

Furthermore, balancing the conveniences clearly favors litigating in California. Presence of witnesses in the forum state and the economic consequences of traveling to litigate are significant factors. *Travelers*

Health Assn. v. Virginia, 339 U.S. 643, 648-649, 94 L.Ed. 1154, 1161-62, 70 S.Ct. 927, 930 (1950). Mrs. Horn has been deprived of child support, she and the children live in California, and the evidence as to her needs and their needs, particularly any special needs, will be produced through California witnesses. Dr. Kulko can more easily afford the trip and need only bring evidence as to his income and expenses. It would be unreasonable to force Mrs. Horn and the children to go to New York. *Cf.*, *Mitchim v. Mitchim*, 518 S.W.2d 362, 367 (Tex. 1975).

Nor can Mrs. Horn be accused of forum shopping. In fact, the original forum, Haiti, no longer has an interest in the matter, and Dr. Kulko helped choose the forum in which she must litigate out of economic necessity, by sending the children there and by not paying support. She should not be forced to abandon the children's right to support. *Hines v. Clendenning*, 465 P.2d 460, 463 (Okla. 1970).

Dr. Kulko's reliance on the holding of *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958), is misplaced [J.S., pp. 16, 19, 20, 21]. There, Florida could not obtain personal jurisdiction over a Delaware trustee when the litigation did not arise from an act or transaction of the trustee and the subject of the suit was the validity of an agreement entered into "without any connection with the forum State." At 251, 252. His contract and conduct are connected to California.

The factors militate in favor of California's jurisdiction.

The States' rules for acquiring jurisdiction over absent parents are developing in accordance with principles

established by this Court. *See*, Annot., *Long-Arm Statutes: Obtaining Jurisdiction Over Nonresident Parent in Filiation or Support Proceeding*, 76 A.L.R.3d 708 (1977) and law review material cited above, collecting cases. The development in the state courts should be allowed to continue.

C. The Father Voluntarily Entered Into an Agreement Which Required Performance in California.

The divorce agreement recited that the mother lived in California, would have custody in California part of the year, and would receive child support payments there. The purpose of the agreement was incorporation into a Haitian divorce decree. By their very nature, custody and support provisions are subject to modification in the best interests of the children.

Thus, the father knew part of the original agreement was to be performed in California and he might be subjected to efforts to legally modify those parts of the agreement. Jurisdiction to litigate over a contract exists in the state where an agreement, or part of it, is to be performed. "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connections with that State." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 2 L.Ed.2d 223, 226, 78 S.Ct. 199, 201 (1957). Where a contract is to be performed in whole or in part in the forum state and the defendant could foresee performance there, substantial connections exist for long arm jurisdiction purposes. Gorfinkel and Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 Hastings L.J. 1163, 1215 (May 1970) and cases collected at p. 1214, n. 206.

Now, effectively, the father and mother have agreed to modify the custody and support agreement to provide for virtually full performance in California. This is the import of his request that she keep both children with her. Currently, the agreement itself provides a sufficient basis for jurisdiction in the forum state.

This is an additional, independent basis for personal jurisdiction.

The judgment should be affirmed.

II

No Substantial Policy Question Could Be Resolved by Hearing This Case.

A. The Decision Will Not Deprive Children of Visitation Because It Expressly Distinguishes Visitation in a State From Allowing a Child to Live in a State.

Dr. Kulko argues that the decision below will keep fathers from visiting with their children or allowing visitation with mothers, thus making an exercise of jurisdiction over him unreasonable and raising a Constitutional issue of importance to many families [J.S., pp. 23-25]. His fears are unfounded and are directly contrary to the views expressed in the opinion.

The California Supreme Court carefully examined, approved, and distinguished two California Court of Appeal cases [J.S., App. A, pp. vii-x], which held it was unreasonable to exercise in personam jurisdiction over a father for child support where his contacts with California were merely incidental to visitation with the children. *Titus v. Superior Court*, 23 Cal.App. 3d 792, 100 Cal.Rptr. 477 (1972); *Judd v. Superior Court*, 60 Cal.App.3d 38, 131 Cal.Rptr. 246 (1976). Further, the *Judd* court based its holding largely

upon the fact that "(t)he original domicile of this family was in New York, and petitioner [father] was not responsible for his former wife and his children moving to California." 60 Cal.App.3d at 45, 131 Cal. Rptr. at 249. At the time of the original agreement and each modification as to custody, Mrs. Horn lived in California so she did not leave the marital domicile. Under the *Judd* test, Dr. Kulko was directly responsible for one child moving to California and for both of them staying there. The situation is easily distinguishable from mere visitation. In fact, he never sent them to California for visitation, but for Mrs. Horn's period of "care, custody and control" of the children.

Moreover, if interests are to be balanced, the children's need for support ought to weigh heavily on the scale; it is the strongest of public policies.

No serious question is presented.

B. These Unique Facts Do Not Present an Appropriate Vehicle for Examination of Broad Constitutional Principles.

Few cases concerned with long arm jurisdiction to award support involve circumstances such as these. The agreement between New York and California residents for a Haitian divorce giving custody to each party for part of the year, as opposed to visitation, with the father sending one child to California to live with the mother, continuing to return her after summer visits, and investigating living conditions before deciding to let both children stay in California, present several unique facts. This combination of events is highly unlikely to recur in any given case.

The usual events giving rise to long arm child support jurisdiction issues are absent, e.g., child stealing, refus-

ing to return a child after visitation, one parent leaving the state of marital domicile before or after commencement of an action, both parties moving from the state originally granting the divorce, etc. There is much less reason for hearing this controversy than several domestic relations matters the Court has declined.

The appeal should be dismissed.

Conclusion.

The case was correctly decided in accordance with developing Constitutional law in the field and the judgment should be affirmed. Alternatively, the appeal should be dismissed as one involving unique facts which do not present an issue of substantial interest. There is no basis for granting certiorari.

Respectfully submitted,

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*Attorneys for Appellee,
Sharon Kulko Horn.*

Supreme Court, U. S.
FILED

JAN 26 1978

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-293

EZRA KULKO,
Appellant,

vs.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO;
SHARON KULKO HORN,**
Appellees.

**On Appeal from the Supreme Court of
the State of California**

BRIEF FOR APPELLANT

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January 26, 1978.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
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Appellees.

On Appeal from the Supreme Court of
the State of California

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of California (J.S. App. A) is reported at 19 Cal.3d 514, 138 Cal.Rptr. 586.

The opinion of the California Supreme Court vacated the opinion of the Court of Appeal, First Appellate District of the State of California (J.S. App. B), reported at 133 Cal.Rptr. 627.

JURISDICTION

The judgment of the California Supreme Court was entered on May 26, 1977 (J.S. App. A). By California law it became final on June 25, 1977.¹ Calif. Rules of Court Rule 24(a). Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

The California Supreme Court is the highest state court in which decision in this case could be had. In its decision, the Court held that Appellant is subject to *in personam* jurisdiction in the state of California (J.S. App. A, xi, xiii) and that such exercise of jurisdiction does not exceed the boundaries established by the United States Constitution (J.S. App. A, v-vi).

The validity of California's Long-Arm Statute (C.C.P. §410.10) as applied to the facts of this case, is drawn into question on the ground that its application in this case is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The California Supreme Court specifically upheld the validity of this application (J.S. App. A, xi, xii).

There has been timely and explicit insistence in all levels of the California state courts that this statute, as applied, is repugnant to the Federal Constitution and raises a substantial federal question. *Charleston Federal Savings & Loan Assoc. v. Alder-*

¹Rule 24, California Rules of Court, states in pertinent part: "A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days." West's California Rules of Court 1977.

son (1945) 324 U.S. 182, 185; *Cohen v. California* (1971) 403 U.S. 15, 18.

The requirement of 28 U.S.C. §1257 (2) that the lower court hold in favor of the validity of the statute is satisfied when the state court holds the statute applicable to the particular set of facts against appellant's assertion that such application is invalid as repugnant to the constitution. *Dahnke-Walker Milling Co. v. Bondurant* (1921) 257 U.S. 282.

From the first instance when an attempt was made to subject Appellant to California jurisdiction, he has urged that this application of the statute is invalid. The basis for the contention is that the statute is limited by the United States Constitution and this application exceeds those limits because Appellant does not have the requisite minimum contacts to satisfy the constitutional due process requirement as set forth in *International Shoe Co. v. Washington* (1945) 326 U.S. 310, *McGee v. International Life Insurance Co.* (1957) 355 U.S. 220, *Hanson v. Denckla* (1958) 357 U.S. 235.

On the basis of the California Supreme Court decision upholding jurisdiction, the California Superior Court for the City and County of San Francisco modified the divorce decree of the parties by awarding increased child support to the mother. (See attached Appendix.) Appellant has not been able to appear and defend on the merits without admitting jurisdiction under C.C.P. §410.10. Therefore, it can be seen that the underlying litigation between Appellant and Real Party in Interest involves two aspects: (1) modifica-

tion of child support and (2) jurisdiction. The former has not been pursued to final judgment; once jurisdiction has been assumed, it is retained by the court until the child reaches majority, is married or otherwise emancipated.² However, the jurisdiction question has reached final judgment in the highest state court.

The issue presented here, whether or not jurisdiction offends traditional notions of substantial justice and fair play, is entirely distinct from the merits of the modification proceeding. *Clark v. Williard* (1934) 292 U.S. 112, 117-119. In spite of the fact that the modification proceedings are not final, it is critical that this court review the jurisdictional aspect of the case at this time for two reasons: (1) the Appellant has not made a general appearance in California, thus all proceedings have been conducted without a defense on the merits; and (2) the trial court modification is itself invalid without the grant of jurisdiction which is herein contested.

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded

²California Civil Code §4700 states in pertinent part:

"(a) In any proceeding where there is at issue the support of the minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child. . . . Any order for child support may be modified or revoked as the court may deem necessary, . . . (b) When a court orders a person to make specified payments for support of a child during the child's minority, or until such child is married or otherwise emancipated, the liability of such person terminates upon the happening of such contingency." West's Ann. Civ. Code §4700 (1977 Supp.)

and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

QUESTIONS PRESENTED

Whether, within the limitations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Appellant, a New York father of children residing in California, has by acquiescing to the desire of his children to live in California, rendered himself amenable to proceedings in the California Courts to modify the amount of child support he must pay.

Whether, within the limitations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the State of California can interpret its Long-Arm Statute, C.C.P. §410.10, to encompass a parent's acts in a foreign state which determine his child's future place of residence, as the type of acts which create an effect within the state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 410.10 of the California Code of Civil Procedure (West's Ann. C.C.P. §410.10 (1973 ed.)) provides:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

The Fourteenth Amendment to the United States Constitution (U.S.C.A. Const. Amend. XIV §1 (1972 ed.)) provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

Introduction

The problems giving rise to this litigation occurred approximately one year after a Decree of Divorce was obtained between the parties. These difficulties commenced when Real Party in Interest, Sharon Kulko Horn invited and/or induced the parties' two children to remain with her in California instead of returning to Appellant in New York after a Christmas vacation visitation in December, 1973.

After protests by Appellant, the children were returned to his custody in January, 1974. At that time, the daughter, Ilsa, promptly expressed a desire to return to the mother in California. Appellant acquiesced to her wishes to the extent he purchased for her a one-way airline ticket to California. For the next two years both parties accepted the split custody arrangement, the son Darwin, living with Appellant in New York, and the daughter, Ilsa, living with Real Party in Interest in California. Each child spent visitation time with the opposite parent in that parent's state of residence.

In January, 1976, the son requested and received air fare from Real Party in Interest and departed from New York to live in California with his mother without informing Appellant.

No legal steps, aside from the original decree of divorce, were taken by either party until the instant proceedings.

Summary of Proceedings and Judgments Below

The parties, EZRA KULKO, Appellant, and SHARON KULKO HORN, Real Party in Interest, as well as their two children, Darwin, born June 23, 1961, and Ilsa, born July 10, 1962, were domiciliaries of New York until the separation between the parties in March, 1972, at which time Sharon left the family home and eventually moved to California. The children remained with their father.

The parties were married in California on July 29, 1959. Dr. Kulko arrived in California on July 29, 1959, en route from his post in Fort Sam Houston to Korea, his new duty station with the United States Armed Forces. By pre-arrangement, Mrs. Horn came to California from New York for the marriage ceremony. Dr. Kulko departed for Korea on August 2, 1959, and Mrs. Horn returned to her home in New York.

Dr. Kulko's only other contact with California occurred on August 13 and 14, 1960, when he had a one night stop-over in California, incident to his being transported from Korea to New York as part of his military service.

Both parties were domiciliaries of New York at the time of the marriage. Appellant is now, and has always been, a domiciliary of New York.

On September 19, 1972, in New York, the parties executed a separation agreement (App. 8-12), prepared by New York counsel retained by Mrs. Horn. Appellant did not have legal counsel. Mrs. Horn then flew to Haiti where she obtained a decree of divorce on September 25, 1972 (App. 13-15) by consent. The separation agreement (App. 8-12) was incorporated into the decree. Mrs. Horn immediately returned to California.

The agreement provided for the children to remain in Dr. Kulko's custody during the school year and in Mrs. Horn's custody during the summer months and for a week at Christmas and Easter vacations (App. 9-10). Dr. Kulko was to pay for their clothing, schooling, and all medical, hospital and dental expenses (App. 10).

In January, 1974, Ilsa was induced by her mother to move to California (App. 29). This was contrary to Dr. Kulko's wishes, but believing opposition would be detrimental to the family relationship, he acquiesced and purchased her a one-way airline ticket to California. Since that time, Ilsa has spent the summers of 1974 and 1975 with her father in New York. Mrs. Horn's affidavit denies this version, but states that Ilsa told her father in December of 1973, before she left for Christmas vacation that she wished to live in California and it was at that time that Dr. Kulko purchased the one-way ticket (App. 32).

Two years later, on or about January 10, 1976, Darwin called his mother in California, and requested to come to California to live (App. 32). Mrs. Horn sent a plane ticket which Darwin picked up at TWA and then proceeded to California (App. 29, 30, 32).

On January 12, 1976, when Darwin left home in the morning, Dr. Kulko understood that the child was on his way to school (App. 30); he was notified, after the fact, that Darwin was in California (App. 30, 33).

On February 5, 1976, Mrs. Horn commenced the underlying action to establish the Haitian decree as a California judgment and requested modification for custody of both children, for increased child support, and for a temporary restraining order to prevent the children's removal by Appellant from her home or the state of California (App. 3-8). Dr. Kulko was personally served in New York on February 23, 1976 (App. 18-19). On April 1, 1977, a notice of motion to quash service of summons for lack of personal jurisdiction (App. 20) was filed. The motion was denied May 17, 1976.

On June 16, 1976, Appellant petitioned the California Court of Appeal for a writ of mandate compelling the respondent court to quash service of summons for the reason that Appellant did not have the requisite minimum contacts with the state of California to meet the due process requirements of the United States Constitution (App. 34-39). An alternative writ of mandate issued ordering the Re-

spondent Court to quash the summons or show cause on or before September 2, 1976, why it had not.

In an opinion filed October 8, 1976, the Court of Appeal denied the peremptory writ and discharged the alternative writ of mandate stating that if Dr. Kulko had consented to the children taking up residence in California, such conduct was clearly an act causing an effect within the state. This being one of the bases for jurisdiction set out by the Restatement³ and in essence incorporated into the statute (J.S. App. B. xx-xxi) whose application is questioned, there was no offense to the United States Constitution's due process requirement by the exercise of jurisdiction.

The matter was taken to the California Supreme Court by Petition for Hearing filed November 17, 1977. The California Supreme Court rendered its decision on May 26, 1977. The majority of the Court held that an effect in the forum state is the basis for jurisdiction over a nonresident who caused that effect by his out-of-state action (J.S. App. A, xi, xiii). Justice Richardson authored the dissenting opinion in which Justice Clark concurred. This opinion pointed out that there was no purposeful conduct which could reasonably be said to invoke the benefits and protections of California laws, and thus no base on which to ground *in personam* jurisdiction. It concluded that there were insufficient contacts with California to justify the exercise of personal jurisdiction (J.S. App. A, xiii-xviii).

³Restatement of Conflicts of Laws 2d §37.

On August 8, 1977, Real Party in Interest served a Notice of Motion to Set Arrearages and to Increase Child Support; Appellant filed a Notice of Motion to Continue Hearing (by special appearance only) pending the determination of the question by the United States Supreme Court of whether California has *in personam* jurisdiction over him. The Respondent Court, however, proceeded with the hearing and made an order increasing child support, awarding attorneys' fees, and determining arrearages. (Attached appendix.)

Appellant's Application To Stay Enforcement of that order was denied by this Court. There is a continuing threat of attempt by Real Party to enforce the order made by the Respondent Court on September 8, 1977, under the full faith and credit doctrine in the State of New York.

ARGUMENT

I

THE INSTANT DECISION ATTEMPTS TO IMPAIR FUNDAMENTAL PERSONAL LIBERTIES OF A NONRESIDENT

The recent decision rendered by this Court in *Shaffer v. Heitner* (1977) ____ U.S. ____, 97 S.Ct. 2569, 53 L.Ed.2d 683, reviewed the soundness and conceptual structure founded on the century-old case of *Pennoyer v. Neff* (1877) 95 U.S. 714. In this respect, the Court stated at page 694 that:

"From our prospective, the importance of *Pennoyer* is not its result but the fact that its prin-

ciples, and corollaries derived from them, became the basic elements of the constitutional doctrine governing state court jurisdiction."

These principles were likewise reviewed by this Court in its decision in *Hanson v. Denckla* (1958) 357 U.S. 235. In this respect the Court pointed out at 249-250 as follows:

"Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum state was thought to be an absolute nullity, but the matter remained a question of state law over which this Court exercised no authority. With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the Court had not acquired *in personam* jurisdiction was void within the State as well as without. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565."

In that case, the Court went on to state at page 251 that:

"the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states."

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon a personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock* (1959) 361 U.S. 516, 524.

The thrust and impact of this California decision is to intrude into the intricate and sensitive fabric of family relations so as to interfere with the legitimate and desirable right of parents to work out the details of child rearing by non-legal means, and to permit them thereafter to modify their plans to meet the changing needs and continuing best interests of their children. As such it impairs the personal liberties of the parties involved and their children.

A. The contacts between Dr. Kulko and the State of California are so minimal as to clearly offend traditional notions of fair play and substantial justice.

In *Hanson v. Denckla* (1958) 357 U.S. 235, 253, this Court stated:

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities

within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95."

It is hard to envision anyone, who finds himself with sufficient involvement to be served with legal process, who could have less "contacts" than Dr. Kulko had in the instant case. These are set forth in the two affidavits of Ezra Kulko submitted to the trial court (App. 24-31).

Certainly whatever contacts did exist predated the Separation Agreement of September 19, 1972 (App. 8-12) and the Decree of Divorce of September 25, 1972 (App. 13-15), and as such became res judicata as to all issues that were or would have been litigated therein. See *Schoch v. Superior Court* (1970) 11 Cal. App.3d 1200, 90 Cal.Rptr. 365,⁴ which denied juris-

⁴In footnote No. 3 at p. 1208, the court stated:

"No opinion is expressed as to whether under the new law (Code Civ. Proc. § 410.10), the facts that a child resided in this state at the time of the dissolution of the family and continues to so reside, and that an agreement was entered into within this state which provided for the support of the child, would furnish such minimum contacts with this state that the maintenance of suit for a future failure to support, either under the terms of the agreement or under changed circumstances, against a nonresident father who is personally served outside of the state would not offend traditional notions of fair play and substantial justice. (See *International Shoe Co. v. State of Washington* (1945) 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95; 1969 Judicial Council Report to the Governor and the Legislature, pp. 69-84; Am.Law Inst., Restat. of the Law, Second, Proposed Official Draft (1967) Conflict of Laws, §§ 27-39, particularly §§ 36, subd. (2), 37 and 39; Gorfinkel & Lavine, California Long-Arm Jurisdiction (1970) 21 Hastings L.J., 1163, cf. pp. 1173-1178 with pp. 1214-1216; Ehrenzweig & Mills, Personal Service Outside the State (1953) 41 Cal.L.Rev. 383, 392.)"

diction over a nonresident father to increase child support.

Accordingly, the sole basis upon which California can and does assert personal jurisdiction in this case is by an extended interpretation of its long-arm statute, Code of Civil Procedure §410.10, under the recognized basis for jurisdiction "causing an effect in the state by an act done elsewhere." The Supreme Court of California affirmed such jurisdiction upon *the act of a parent permitting his minor child to live in California*.

In reaching its conclusion, the Court took note of its statement made in *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 128 Cal.Rptr. 34, as follows, at page 446:

"notwithstanding this 'effect' the imposition of jurisdiction may be unreasonable."

In this respect, the California Supreme Court in its instant decision acknowledged the following:

"It is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an 'effect' in California could theoretically subject him to *in personam* jurisdiction in California. If this theory of jurisdiction were carried out to its full extremes, it is obvious that it would discourage those outside California from having any contacts or relations with persons living in our state." (J.S. App. A, v.).

It is respectfully submitted that the rationale and potential impact of the Court's decision reaches and

surpasses the outer limits of extending *in personam* jurisdiction, and should not be permitted.

In *Shaffer v. Heitner* (1977) U.S., 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683, 702, this Court stated:

"when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' The cost is too high."

- B. The act of a father in consenting to the request of a child to change parental custody and move to another state should not be construed as a device to achieve *in personam* jurisdiction.

In the instant case, all of the significant occurrences in which Appellant was a participant took place in the State of New York. When the separation agreement between the parties was executed it contemplated that both children would reside nine months in the custody of the father in New York and three months in the custody of the mother in California (App. 9-10). At that time the obligation for child support was agreed upon. It seems clear that at the execution of the agreement neither party was under the belief that their acts were such as to confer personal jurisdiction over Ezra Kulko in the State of California. However, such is the implication which the California decision achieves, since he acted to confirm custody for part of the year in California at that time.

Accordingly, the question arises as to why, if the parties did not confer personal jurisdiction by Cali-

fornia over Dr. Kulko when he executed the agreement in New York providing that Sharon was entitled to both custody and support for three months of the year, it suddenly spontaneously occurs by the much less formal act of consenting to Elsa's request to expand the period of time with her mother, presumably simply by exchanging time periods, i.e., nine months with Sharon and three months with Ezra, approximately a year later. Certainly under the rationale of the California decision, the parties agreed to avail themselves of the "total panoply of the state's laws, institutions and resources," to the same extent for three months as occurred later, except for a longer duration of time. The only apparent difference being that of their schooling.

It is clear that prior to the holding in the instant case, California's appellate courts had refused to extend *in personam* jurisdiction in family law cases involving similar acts of nonresident parents. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 131 Cal. Rptr. 246; *Titus v. Superior Court* (1972) 23 Cal. App.3d 792, 100 Cal.Rptr. 477; *Schoch v. Superior Court* (1970) 11 Cal.App.3d 1200, 90 Cal.Rptr. 365. Heretofore, the accepted basis for obtaining jurisdiction was that expressed in *Schoch, supra*, as follows, at page 1204:

"An order for the payment of child support, like an order for the payment of alimony, saddles the father with a financial obligation of a personal nature which, if valid, can be enforced in any state where the defendant may be located. 'This being so, the defendant is entitled to insist

that such a judgment be predicated upon personal service within the state which seeks to impose such obligation. To hold otherwise would be to violate the fundamental requirement of due process, and to give an unwarranted, extra-territorial effect to the judicial process of the issuing state.' (Perry v. Perry (1953) 119 Cal.App.2d 461, 464, 259 P.2d 953, 954. See also Hartford v. Superior Court (1956) 47 Cal.2d 447, 454, 304 P.2d 1; Amparan v. Superior Court (1966) 246 Cal.App.2d 41, 44, 54 Cal.Rptr. 501; Josephson v. Superior Court (1963) 219 Cal.App.2d 354, 360-361, 33 Cal.Rptr. 196; Turner v. Superior Court (1963) 218 Cal.App.2d 468, 472, 32 Cal.Rptr. 717; and Sharove v. Middelman, supra, 146 Cal.App.2d 199, 202, 303 P.2d 900.)"

It is respectfully submitted that the rationale expressed above is still the appropriate rule of law, and applicable as well in the instant case. The acts of parents in trying to achieve the elusive answers of how, where and with what degree of parental influence children should be raised, is so personal and evolving in nature, as to preclude the use of such acts as a sound basis for procedural due process, in this case *in personam* jurisdiction.

II

THE NATURE OF THE EFFECTS ATTRIBUTABLE TO DR. KULKO'S ACTS AND HIS RELATIONSHIP TO THE STATE OF CALIFORNIA MAKE THE EXERCISE OF PERSONAL JURISDICTION OVER HIM BY THE STATE OF CALIFORNIA UNREASONABLE.

The circumstances adopted by California for assessing the effects within the state by acts done elsewhere are those set forth in the Restatement, to wit:

- (1) The act was done with the intention of causing effects in this state;
- (2) The act, although not with the intention of causing effects in this state, could reasonably have been expected to do so;
- (3) The act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so.

Restatement of Conflict of Laws 2d, §37, Caveat, p. 156.⁵

Appellant submits that only circumstance (3) applies in this case, and as such does not invoke the operation of C.C.P. §410.10. The single acts of Dr. Kulko in consenting to his daughter's wishes to stay with her mother, assisting her to make the change by purchasing a one-way ticket and allowing her to remain and reside during the school year in California is seized upon by the California Supreme Court

⁵A detailed examination and explanation of Code of Civil Procedure Section 410.10, and in particular the California Judicial Council's comments concerning base No. (9); that is, "Causing Effect in State by Act or Omission Elsewhere," appears in *Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296, 302 et seq., 118 Cal.Rptr. 548.

as an indication that Dr. Kulko "purposely availed himself" of the benefit and protection of California's laws. In addition, the Court found that he achieved an economic benefit by being no longer liable for the child's support.

Appellant respectfully challenges the rationale of these conclusions. *First*, it is clearly a fiction to assert that Dr. Kulko by his acts intended to invoke the benefit and protection of any laws in California. On the contrary, the facts set forth in Dr. Kulko's Affidavit, paragraphs 6 through 9 (App. 29-30) indicate that he was most unhappy over the desire of either or both children to change residence and custodial parents. Under such circumstances, with his former wife already a resident of California, there were few, if any, alternatives available to him. Certainly, he was not aware, nor had he reason to believe, that by accepting the realities of his children's desires he was conferring *in personam* jurisdiction to a state 3,000 miles distant. Our contemporary views of "fair play and substantial justice" would at a minimum entitle the acting party to some awareness of the legal and financial consequence of his alternative choices. The absence of this knowledge constitutes a violation of the long established constitutional requirement of "fair notice." Other options available to him were the following:

- a. Denial of his daughter's request,
- b. Invoking legal proceedings in New York,
- c. Opening up new negotiations for a modified agreement before agreeing to any change.

Each of the above would have provoked an emotional response, re-opened hostilities, and induced further legal action.

Instead, Dr. Kulko accepted the alternative least likely to strain the already difficult relationships between the various members of the family. It is certainly a reasonable conclusion that the choice of greatest cooperation which would best preserve family harmony, and which might lead to a change of heart and/or mind by either or both children to return to the father at a later time, was an appropriate parental solution at the time.

The assertion that Appellant achieved an economic benefit is inappropriate, if even factually accurate. It goes to the very heart of why parents have children at all, or desire their custody. Obviously the costs invoked are always a secondary consideration. It is of the same degree as telling the parents in a child wrongful-death case of their economic savings. In any case, the obligation of Appellant to support his children would seem to be potentially the same whether he paid such costs directly or indirectly through child support. Presumably, this obligation would exist if presented to the courts of New York as well as California.

The same reasoning that challenges the inference that Dr. Kulko's acts were of an intentional type, applies equally to the concept of reasonable expectation of causing effects. Both suggest a process of objective thought and planning. Unfortunately, such objectivity is the exception rather than the norm in family law disputes.

It is respectfully submitted that the California Supreme Court was involved in selective distinctions when it found that neither the cases of *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 100 Cal.Rptr. 477 nor *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 131 Cal.Rptr. 246, which both held it unreasonable to impose personal jurisdiction, were applicable to the instant case. In *Titus*, the children were originally sent to California for visits and kept there. This almost occurred in the instant case. Instead, Ilsa was returned and then asked to remain with the mother, a month later.

In *Judd*, *supra*, an agreement permitted the children to live with the mother, who then moved to California, apparently with the knowledge and consent of the father, where the father thereafter visited the children and paid support for them. In both cases, the father was relieved of the obligation to care for the children himself, and in both he consented or at least made no objection *at a later time* to permitting the children to live in California. It is submitted that the strong public policy encouraging support and communication between a natural father and his children, without discouraging the father from the expense and inconvenience of relitigating support in California, applied in these cases, should apply as well in this case and all similar family law disputes. This was precisely the solution invited by Appellant in his letter to Real Party in Interest (App. 44). In addition, the act of a parent in permitting a child to take up residence with the other parent in a distant state, should not be construed as a type of general

appearance by the nonresident for future legal proceedings in the distant state.

It is submitted that the acts of Dr. Kulko in conceding to the wishes of his children and in effect accepting an implied modification of the marital agreement as to custody, are less intentional than those of the parent in the first instance who agrees in a marital agreement to allow the children to come to live in California with the other parent. The instant decision would logically have the legal effect of causing nonresident settlement agreements to constitute intentional acts establishing *in personam* jurisdiction over a nonresident parent.

III

A BALANCING OF BURDENS BETWEEN THE NONRESIDENT, DR. KULKO, AND THE RESIDENT, MRS. HORN, WEIGHS HEAVILY AGAINST ESTABLISHING PERSONAL JURISDICTION OVER DR. KULKO.

In *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 128 Cal.Rptr. 34, and *Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 80 Cal.Rptr. 113, the California Supreme Court recognized the need for an additional inquiry on the question of fairness and reasonableness, notwithstanding the finding of "effect". In particular, the court stated in *Buckeye Boiler* at page 899:

"Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity,

the propriety of an assumption of jurisdiction depends upon a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (McGee v. International Life Ins. Co., *supra*, 355 U.S. 220, 223, 78 S.Ct. 199; Fisher Governor Co. v. Superior Court, *supra*, 53 Cal.2d 222, 225, 226, 1 Cal. Rptr. 1, 347 P.2d 1.) In other words, once the threshold of sufficient activity by the defendant has been passed, the question of the propriety of subjecting the defendant to the jurisdiction of the forum involves both a consideration of fairness to the plaintiff (see Phillips v. Anchor Hocking Glass Corporation (1966) 100 Ariz. 251, 413 P.2d 732, 19 A.L.R.3d 1, 7) and a determination of whether, from a standpoint of the logical and orderly distribution of interstate litigation, the forum state is what Professor Ehrenzweig has termed a 'forum conveniens.' (See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens (1956) 65 Yale L.J. 289, 312; see generally, von Mehren and Trautman, Jurisdiction to Adjudicate; a Suggested Analysis (1966) 79 Harv.L.Rev. 1121.)"

A. Potential detriment to Ezra Kulko.

1. Litigation costs and inconvenience of traveling 3,000 miles to protect his interest;
2. Risk of future and repeated hearings;
3. Hardships arising from obligation to conform to local rules, standards, and attitudes, which differ from those where he is domiciled;

4. Possibility of having to change jurisdiction as the child moves about;
5. Possible criminal sanctions imposed for failure to comply with child support orders imposed in his absence;
6. Loss of benefits of bargain made in marital agreement; i.e., the substantial right to have the children with him, and concessions made therefor; and,
7. Costs involved in visiting with children.

B. Potential detriment to Sharon Horn.

1. Risk that State of New York would be more protective of Ezra's contractual rights;
2. Risk that State of New York would apply different support standards than California;
3. Inconvenience and lack of personal contact arising from need to invoke Uniform Reciprocal Support Act proceedings; and,
4. Costs and inconvenience of making a personal appearance in New York, if required.

C. Potential detriment to public.

1. Traditionally, family law decisions permit the custodial parent to leave the initial jurisdiction upon showing good cause. Consent by non-custodial parent would now confer personal jurisdiction in the state of their destination.
2. Possibility that if consent to custody in a distant state would confer *in personam* jurisdiction for child support, the custodial parent and/or children

would be likely to forum shop for their best interests; i.e., choosing a state where child support extends to the age of twenty-one years, and/or includes college education.

3. Raises an artificial distinction between parents consenting to change custody after a settlement and those where consent is given at the time of divorce. (This is the distinction between *Kulko* and the cases of *Judd* and *Schoch, supra.*)

IV

THE INSTANT DECISION EFFECTS A MERGER OF TRADITIONAL DISTINCTIONS BETWEEN JURISDICTION TO DETERMINE CUSTODY AND THAT REQUIRED FOR CHILD SUPPORT.

The distinctions in the established criteria required to establish jurisdiction between custody cases and child support are set forth at length in *Titus v. Superior Court, supra.* This distinction was the basis for the denial of jurisdiction in *Schoch v. Superior Court, supra.*

It is submitted that extending *in personam* jurisdiction into family law cases based upon consent to place of residence opens the door to an elimination of these traditional distinctions in family law proceedings, and as such materially and detrimentally affects the orderly resolution of marital breakup, custody, and child support between the parents and without recourse to the Courts.

Certainly a significant legal impact will take place if the consent of a parent to one child, as was given by Dr. Kulko to his daughter, Ilsa, extends by operation of law to other children as well, as occurred in the case of Darwin. By inference, when families agree on a split custody arrangement between their children, as in this case, a subsequent, non-consensual change by a child will carry with it the personal jurisdiction achieved by the initial act of consent over an objecting parent in a distant state. The result could only lead to withholding consent in the first instance, even if its granting were desirable.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the California Supreme Court be reversed, and that this Court should issue its writ of mandate vacating the order of denial and entering its order granting petitioner's motion to quash service of summons for lack of personal jurisdiction.

LAWRENCE H. STOTTER,
Counsel for Appellant.

Of Counsel:

EDWARD SCHAEFFER.

January 26, 1978.

(Appendix Follows)

APPENDIX

Appendix

Superior Court of the State of California
for the City and County of San Francisco

No. 701 626

In re the marriage of
Petitioner: Sharon Kulko Horn
and
Respondent: Ezra Kulko

[Filed Sept. 8, 1977]

**ORDER INCREASING CHILD SUPPORT,
DETERMINING ARREARAGES, AND
FOR ATTORNEY FEES ON ACCOUNT**

This matter came on for hearing on August 30, 1977, petitioner being personally present and represented in court by her attorneys, Schapiro and Thorn, Inc. by Suzie S. Thorn, and respondent not being personally present but represented in court by his attorneys, Stern, Stotter and O'Brien by Lawrence H. Stotter who made a special appearance only to contest the jurisdiction of the Court, and evidence having been introduced and good cause appearing therefor, the Court finds as follows:

1. The Court has jurisdiction to make child support and other orders in this matter.

2. Petitioner needs, and respondent has the ability to pay, reasonable sums for the support of each minor child.

3. Respondent owed, under the agreement of the parties, \$9,000.00 child support for 1973, 1974 and 1975. Respondent paid during that period \$2,000.00 in child support, and there is due, owing and unpaid for said period \$7,000.00.

4. Respondent owed for child support for 1976 the sum of \$6,000.00, and paid nothing during said period.

5. Respondent owed for child support for the period 1/1/77 thru 8/31/77 the sum of \$4,800.00 child support and paid nothing for said period.

6. Petitioner has incurred substantial legal expenses in the prosecution of this case, and respondent has the ability to pay reasonable sums for attorney fees and litigation costs.

Now, Therefore, It Is Ordered:

1. Respondent's motion to continue this hearing pending an appeal to the U.S. Supreme Court is denied.

2. Respondent shall pay to petitioner for the support of each minor child the sum of \$300.00 per month, a total of \$600.00 per month, commencing March 1, 1976 and continuing on the 1st of each month until further order of court.

3. As and for additional child support, respondent shall pay one-half the private school tuition for each child, commencing with the 1977-78 school year and

continuing so long as said child attends private school, or until further order of court.

4. Respondent is in arrears in payments of child support in the total sum of \$17,800.00 and respondent shall pay said sum forthwith to petitioner.

5. The determination of respondent's arrearage in payments for clothing and medical expenses for the children is deferred to further hearing herein.

6. Respondent shall pay to Schapiro and Thorn, Inc., petitioner's attorneys, the sum of \$7,500.00 on account of attorney fees and litigation costs without prejudice to the future determination of the actual and reasonable amount of attorney fees and litigation costs in this matter.

Dated: Sept. 8, 1977

/s/ Donald B. King
Donald B. King
Judge of the Superior Court

Supreme Court, U.S.
FILED

FEB 27 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977
No. 77-293

EZRA KULKO,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO; and
SHARON KULKO HORN,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR APPELLEE

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IN THE
Supreme Court of the United States

October Term, 1977

No. 77-293

EZRA KULKO,

Appellant,

vs.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO; and
SHARON KULKO HORN,**

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR APPELLEE.

OPINIONS BELOW.

The opinion of the California Supreme Court is reported at 19 Cal.3d 514, 138 Cal.Rptr. 586, 564 P.2d 353.

The opinion of the California Court of Appeal, 133 Cal.Rptr. 627, was vacated and rendered a nullity when the California Supreme Court granted a hearing. (6 Witkin, *California Procedure* (2d ed. 1971), Appeal, §617, pp. 4540-4541.)

I

JURISDICTION.

(1) Jurisdiction by Appeal Has Not Been Invoked Because No Statute Was Explicitly Challenged or Upheld.

Appellant¹ seeks to invoke appeal jurisdiction, 28 U.S.C., §1257(2), for review of a judgment exercising jurisdiction over him under California's long-arm statute.

Review by appeal is not available, however, because there was never an explicit constitutional attack upon the validity of California Code of Civil Procedure section 410.10, on its face or as applied. The constitutionality of a state statute must be expressly drawn

¹*Matters of Form.*

Appellant, defendant below, is Ezra Kulko, a dentist. He is referred to as Dr. Kulko, or as appellant, or as the father of the children whose welfare is the subject of this action.

Appellee, plaintiff below, is Sharon Kulko Horn, Dr. Kulko's former wife. She is referred to as Mrs. Horn, or as appellee, or as the mother of the children whose custodial care and support is the subject matter of this case.

The Superior Court of the State of California in and for the City and County of San Francisco was respondent below only because the action was an original proceeding for a writ of mandate. The court never appeared below or here and is not mentioned as a party.

"J.S." refers to the Jurisdictional Statement.

"J.S., App." refers to the Appendix to the Jurisdictional Statement.

"A." refers to the printed Appendix.

"Brf. A." refers to the Brief for Appellant.

"Record" refers to the Record certified to this Court.

"Stay App." refers to Appellant's Application to Stay Enforcement of Order of the Superior Court of the State of California in and for the City and County of San Francisco, previously filed herein.

"Documents" refers to the documents of the Superior Court filed in this Court contemporaneously with the filing of the Brief for Appellee in connection with appellee's suggestion that the case is moot. Documents are listed below at footnote 2.

in issue; assertion of a right, privilege, or immunity under the Constitution is not enough. Furthermore, the validity of the statute must be upheld. *Raley v. Ohio*, 360 U.S. 423, 434-435 (1959); *Commonwealth Bank of Kentucky v. Griffith*, 14 Pet. 56 (1840).

"It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws."

Charleston Federal Savings & Loan Assn. v. Alderson, 324 U.S. 182, 185 (1945).

While appellant now contends that the constitutionality of the statute as applied was challenged and upheld [Brf. A., pp. 2-3], the California Supreme Court was concerned only with whether Dr. Kulko, as an individual, had sufficient contacts with California to make it reasonable to maintain the action there. The constitutionality of the statute was never ruled upon. [J.S., App. A, pp. xi-xiii.]

Neither did appellant raise the statute in the California courts.

In the Superior Court, his motion to quash the summons was made solely on the "ground that this Court lacks personal jurisdiction over him in that he is a nonresident who does not have sufficient contact with California to satisfy due process requirements." [A. 21, 37.]

Appellant's petition for a writ of mandate sought review of the Superior Court's denial of the motion upon the same grounds. [A. 34-39.]

In his petition for hearing to the California Supreme Court, appellant contended only that he did not have

minimum contacts with California and that an exercise of jurisdiction deprived him of due process "in that he is not afforded a reasonable opportunity to be heard." Again, no claim was made that the California statute is unconstitutional. [Record: Petition for Hearing, pp. 2, 5.]

Thus, the statute was not mentioned until this Court. [J.S., p. 4.] Appellant's claims to a right, privilege, or immunity personal to him must be reviewed by certiorari, if at all. Appeal does not lie. *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958).

Note, too, that the Questions Presented in the Brief for Appellant [p. 5] seem to change the issues from the one in the Jurisdictional Statement which challenged construction of the statute [p. 4], and do not explicitly draw the statute into issue. Rather, appellant now wants review of whether his "acquiescing" to his children and his "acts . . . which determine(d) his child's future place of residence . . ." are acts which subject him to California's jurisdiction. These questions may be determined without reaching the constitutionality of the statute.

Appellant's confusion of the issues may be a result of the wording of the statute he now wants examined: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc., §410.10. But a claim that a personal right has been infringed is not a coextensive attack on the statute. If it were, every case upholding an exercise of jurisdiction under similar statutes, which several states have enacted, would result in a judgment appealable to this Court, each testing the outer limits of

due process. Cf., Mr. Justice Brennan, concurring and dissenting, *Shaffer v. Heitner*, No. 75-1812 (June 24, 1977), Slip Opinion, p. 2, n. 1.

Moreover, appellant could have framed a challenge to the statute, on its face or as applied. For instance, he might have contended it was too vague and did not give adequate notice of what contacts might result in jurisdiction. Cf., Mr. Justice Stevens, concurring, *Shaffer v. Heitner*, Slip Opinion. Or he could have complained that he had been subjected to shifting standards or to retroactive application of a new test; or that this application of the statute impaired obligations of a contract. Whether those claims would be valid is another question, but attacks on the statute could have been framed; they were not.

Thus, the California Supreme Court did not interpret its statute, as it had not been placed in issue, but construed the federal Constitution. Even here appellant does not argue the statute itself is unconstitutional, but rather contends only that his contacts are not sufficient under *Hanson v. Denckla*. [Brf. A., pp. 4, 11-27.]

The appeal should be dismissed for lack of jurisdiction.

(2) Review Is Not Appropriate Because This Peculiar Combination of Events Does Not Clearly Raise Recurring Issues of National Importance.

The appropriateness of exercising jurisdiction over this father must be determined on the basis of all the facts and circumstances involved in the relationships between these parties, their children, child support and child custody, and California. This action resulted from

an unusual series of dealings in a continuous course of conduct not likely to recur:

At the time of the divorce settlement the wife lived in California; she was to have legal custody in California part of each year; she was to receive child support payments in California; the father was seriously in arrears as to child support at the time the action was started; two years before the action was started, the father sent the 11-year-old daughter to live in California permanently; the father used a California public agency to investigate the living conditions before deciding the 14-year-old son should live in California, too; the father agreed in writing to modify the original agreement so both children could live in California; the father agreed to increase child support payable in California, leaving open only the amount to be paid; the father concedes jurisdiction over child custody which is raised in the same complaint; jurisdiction over child custody is appropriate under established standards of custody jurisdiction; correspondence and telephone calls were sent to and from California to investigate and negotiate the modification; the original judgment is of a foreign country which no longer has any interest in the case; there is no judgment in the state of defendant's residence which was the state of the marital domicile; and, altogether, there has been a long, continuous course of relationships with California residents regarding the subject of the suit: the children.

The case does not present the isolated issues appellant argues despite his efforts to fragment the case and treat the facts independently. He raises a series of

hypotheticals based on component facts and argues their supposed consequences, focusing on the separate elements of his relationship instead of the actual combination of facts. For instance, he asks: What if a father with just visitation rights had merely permitted the mother with legal custody to take the children from the original jurisdiction (Haiti)? [Brf. A., p. 25, c. 1.] (The significance of that question could well depend on whether there had been an order restraining her from removing the children.) What if the child had been sent for visitation only? [Brf. A., p. 22.] What if only the original divorce agreement were involved? [Brf. A., pp. 16-17, 23, 26, 27.] What if Mrs. Horn were forum shopping? [Brf. A., pp. 25-26.] Must not a defendant have specific intent to confer jurisdiction? [Brf. A., pp. 16-17, 21 ¶3.] But the elements cannot be treated separately, they occurred together.

Little will be gained from a review of the other propositions appellant seemingly asks this Court to adopt: (1). "Contacts" means physical presence in the forum state [Brf. A., pp. 14-16] because of the continued "soundness and conceptual structure" of *Pennoyer v. Neff*, 95 U.S. 714 (1877) with its territorial limitations on the power of states [Brf. A., pp. 11-12, 17-18]; (2). Jurisdiction should be much more restricted in child support proceedings than in other legal relationships [Brf. A., pp. 17-18]; (3). Transactions affecting children are of less consequence than commercial transactions [Brf. A., pp. 15, 16-18, 19-21]; and (4). Mothers and children should be left to their own devices to negotiate the personal matters of custody and support with the father without "inter-

ference" from courts by the exercise of long-arm jurisdiction. [Brf. A., pp. 13, 18, 26.]

The other issue appellant raised, possible interference with interstate visitation, which he advanced as a major policy question to be reviewed [J.S., pp. 18, 24-25], is not argued in his brief. Rather, he equates permanent custody to temporary visitation [Brf. A., p. 22], and contends long-arm jurisdiction should not apply to family law. [Brf. A., pp. 13, 18, 26].

Consequently, no major issues are presented. Only the parties will be affected by review of this unique case which does not present clear issues of national import. Cf., U.S. Supreme Ct. Rule 19(1); *Kimbrough v. United States*, 364 U.S. 661 (1961). As presented, without constitutionality of a statute in issue, the cause does not merit review by appeal or by certiorari.

(3) This Court Has Been Deprived of Jurisdiction of the Case Because Appellant's Attack on Jurisdiction Over Him Was Rendered Moot by His General Appearance.

Appellant challenges an exercise of jurisdiction over him by California in an action to establish a Haitian divorce decree as a foreign judgment in California so child custody may be awarded to appellee and appellant's child support obligation may be increased. Appellee also seeks arrearages of child support due under the Haitian decree. [A. 3-8.]

Appellant moved to quash the summons pursuant to California Code of Civil Procedure section 418.10. [Appendix to this Brief.] When the California Superior Court denied his motion, appellant sought review by the speedy statutory remedy of a petition for a writ

of mandate. The California Supreme Court affirmed by an opinion filed May 26, 1977 which became final as to California courts on June 25, 1977. [Brf. A., p. 2.] Notice of appeal was filed August 3, 1977. [A. 2.]

Appellant did not seek a stay of the issuance of the remittitur from the California Supreme Court, Cal. Rules of Court, rule 25, and jurisdiction reinvested in the Superior Court. Appellee then filed a motion asking for child support, attorney fees, and costs pending trial on the merits of the complaint, and asked the court to set the arrearages due under the Haitian decree. [Documents: Motion.]²

In response, appellant filed two documents. One was a written response to appellee's motion labeled "by special appearance only" in which he asked "pend-

²*Documents Lodged.*

Certified copies of the following documents of the California Superior Court in and for the City and County of San Francisco have been submitted herewith for consideration of this issue:

- (1) Notice of Motion (Marriage) to Set Arrearages and to Increase Child Support.
- (2) Responsive Declaration re Notice of Motion by Special Appearance Only.
- (3) Notice of Motion and Motion to Continue Hearing (By Special Appearance Only).
- (4) Minute Order of August 30, 1977.
- (5) Order Increasing Child Support, Determining Arrearages, and for Attorney Fees on Account (also Brf. A., Appendix).
- (6) Declaration of Judge of the Superior Court, filed September 20, 1977.
- (7) Reporter's Transcript of proceedings of August 30, 1977.

Also relevant is a letter to the Honorable Donald B. King, Judge of the California Superior Court, dated September 8, 1977, submitted by appellant's counsel in support of appellant's request that the motion be continued, stayed, or denied. This letter was not in the Superior Court file when certified copies were requested, but a copy of the letter was previously filed in this Court by appellant. [Stay App., Ex. B.]

ing final Appeal herein that said motion should be denied without prejudice, continued, or stayed." The other was a written "Notice of Motion and Motion to Continue Hearing (By Special Appearance Only)" in which he moved for a continuance of the hearing of the motion pending determination of the proceedings in this Court. [Documents.]

Appellant's counsel did not attend the August 30, 1977 hearing, but communicated with the judge to request leave to submit additional arguments in support of his position. [Documents: Reporter's Transcript, p. 1.] Appellant's counsel submitted a letter dated September 8, 1977 in which he stated, *inter alia*:

"(2) My investigation reveals that a stay of proceedings in the trial court remains in the discretion of that court; i.e., yourself, while the appeal is pending in the United States Supreme Court.
* * *

“(3) It is my view that the response filed by myself to Mrs. Thorn's motion places before yourself the option of granting a stay, continuance, etc., and accordingly that the matter presently rests with yourself for determination, unless it would be your view that a totally separate motion should be filed by myself affirmatively requesting a stay. * * *

[Stay App., Ex. B.]

The California Superior Court determined it had jurisdiction to hear appellee's requests, denied appellant's motion to continue, denied a stay, and refused to dismiss the motion. Relief was granted as prayed, including fixing arrearages due under the Haitian decree

as requested in the complaint. [Documents; Brf. A., Appendix, pp. i-iii.]

Appellant applied directly to this Court for a stay of the Superior Court order. [Stay App.] Stay was denied by Mr. Justice Rehnquist for failure to comply with Supreme Court Rule 18(2).

Unless there is a case or controversy at all stages of the proceedings, this Court does not have jurisdiction. U.S. Const., Art. III; *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10 (1974); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3 (1964). By California law and accepted common law principles, appellant has made a general appearance, submitting to jurisdiction, and rendering his jurisdictional challenge moot.

California Code of Civil Procedure section 418.10 gave appellant a clear and expeditious way to challenge personal jurisdiction before pleading, a means he pursued.⁸ When the California Supreme Court ruled against him and he decided to ask this Court for relief, however,

⁸For instance, he could have used interrogatories on the jurisdiction issue, *cf.*, *The 1880 Corporation v. Superior Court*, 57 Cal.2d 840, 22 Cal.Rptr. 209, 371 P.2d 985 (1962), although not interrogatories on the merits, *Chirwood v. County of Los Angeles*, 14 Cal.App.3d 522, 92 Cal.Rptr. 441 (1971); made a peremptory challenge to a judge for believed prejudice, *Loftin v. Superior Court*, 19 Cal.App.3d 577, 97 Cal.Rptr. 215 (1971), though not a challenge for cause which would require a hearing, *Donovan v. Superior Court*, 39 Cal.2d 848, 250 P.2d 246 (1952); challenged subject matter jurisdiction at the same time he challenged personal jurisdiction, *Goodwine v. Superior Court*, 63 Cal.2d 481, 47 Cal.Rptr. 201 (1965); moved to dismiss for inconvenient forum, Cal. Code Civ. Proc., §418.10; attacked an attachment, *Fount Wip, Inc. v. Golstein*, 33 Cal.App.3d 184, 108 Cal.Rptr. 732 (1973), and generally pursued any statutory rights, *cf.*, *Berard Const. Co. v. Municipal Court*, 49 Cal.App.3d 710, 122 Cal.Rptr. 825 (1975). There is no personal appearance as long as the court is not asked to exercise its discretion on the merits.

he did not avail himself of clear remedies to stay the issuance of the remittitur and prevent the Superior Court from proceeding on the complaint. Cal. Rules Ct., rule 25, subds. (c), (d).

A stay of the remittitur ordinarily is granted to allow a party to seek a hearing here. *Cf.*, *Reynolds v. E. Clemens Horst Co.*, 36 Cal.App. 529, 172 Pac. 623 (1918) (stay to allow a nonresident defendant to pursue an attack on the exercise of personal jurisdiction to this Court); *California Civil Appellate Practice* (Cont.Ed.Bar 1966), §15.100, p. 544. But, by failing to move for a stay of the issuance of the remittitur (or filing of the opinion in writ proceedings, see *California Civil Writs* (Cont.Ed.Bar 1970), §17.30, p. 420), appellant allowed the Superior Court to reacquire jurisdiction to proceed on the merits. Cal. Code Civ. Proc., §418.10 (default could be taken); *California Civil Writs* (Cont.Ed.Bar 1970), §21.27; 6 Witkin, *California Procedure* (2d ed. 1971), Appeal, §518. Thus, appellant was subject to the Superior Court's plenary jurisdiction when he elected to ask for an exercise of discretion in his favor.

Appellant recognizes an appearance going to the merits subjects him to jurisdiction. [Brf. A., pp. 3, 4.] Apparently, however, he does not realize that labeling his papers "special appearance only" had no legal effect; the relief requested governs the nature of the appearance.⁴ If a party asks for any relief which could

⁴By the same token, the recitals in the order regarding the appearance of Mrs. Horn with her attorney and appellant's special appearance by counsel do not control. The recitals are neither findings nor part of the judgment. *Green v. Swift*, 50 Cal. 454, 455 (1875); *Jacobs v. Norwich Union Fire Ins. Soc.*, 4 Cal.App.2d 1, 4-5, 40 P.2d 899, 901 (1935); 32 Cal.Jur.2d, Judgments, §72.

be given only on the basis that he is a party and that the court has jurisdiction to exercise its discretion, he has made a general appearance. *In re Clarke*, 125 Cal. 388, 392-393, 58 Pac. 22, 23 (1899); *Slaybaugh v. Superior Court*, 70 Cal.App.3d 216, 221-223, 138 Cal.Rptr. 628, 631-633 (1977); *Davis v. Davis*, 305 U.S. 32, 42-43 (1938); see, *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 442 (CA3 1971), cert. denied, 405 U.S. 1017 (1972); Restatement (Second), Conflict of Laws §§32, comment d, 33, comments a, b, d, g.

Appellant wanted a continuance or a stay of appellee's motion which had asked for a partial determination of the merits of the complaint by requesting an order fixing the arrearages due under the Haitian decree, the subject of the main action. Effectively, this sought an extension of time to plead to the complaint because Dr. Kulko then was subject to a default judgment if he did not plead. Cal. Code Civ. Proc., §418.10.

It is settled that a request for a continuance to plead to the merits is a general appearance. *Zobel v. Zobel*, 151 Cal. 98, 101, 90 Pac. 191, 192 (1907) (written motion to continue is a personal appearance); *Knoff v. City and County of San Francisco*, 1 Cal. App.3d 184, 201, 81 Cal.Rptr. 683, 694 (1969); *Davis v. Davis*, 305 U.S. 32, 43 (1938). As long as appellant followed the well-defined procedures available to him, he was protected from actions by appellee. Once he stopped following those procedures, he became subject to the general rules of civil procedure. The request for continuance was, itself, a general appearance.

Appellant also made a general appearance by asking for a denial of the motion which, if granted, would have deprived appellee of interim child support and attorney fees and delayed the judgment for arrearages. One who asks for discretionary relief makes a general appearance. *Lacey v. Bertone*, 33 Cal.2d 649, 203 P.2d 755 (1949); *Remsberg v. Hackney Manufacturing Co.*, 174 Cal. 799, 164 Pac. 792 (1917); *see, Greene v. Committee of Bar Examiners*, 4 Cal.3d 189, 200, n. 6, 93 Cal.Rptr. 24, 31, n. 6, 480 P.2d 976, 983, n. 6 (1971); 1 Witkin, *California Procedure* (2d ed. 1970), Jurisdiction, §130, p. 659. Not only did appellant seek discretionary relief, the letter to Judge King expressed his counsel's considered opinion that the Superior Court had jurisdiction to act.

Additionally, appellee's request for pendente lite relief was a provisional remedy, *In re Marriage of Skelley*, 18 Cal.3d 365, 134 Cal.Rptr. 197, 556 P.2d 297 (1976), and participation in a proceeding for a provisional remedy is a general appearance, *see*, 1 Witkin, *California Procedure* (2d ed. 1970), Jurisdiction, §129, pp. 657-659, and cases collected, as is participation in other ancillary proceedings, especially when the participation goes to the merits of the relief sought. *Cf.*, *Miller v. Miller*, 57 Cal.App.2d 354, 134 P.2d 292 (1943); *MacPherson v. Superior Court*, 22 Cal.App.2d 425, 430-431, 71 P.2d 91, 94-95 (1937). When a written motion to continue is combined with a separate written request to continue, stay the hearing, or deny a motion addressing both the merits and ancillary remedies, there clearly has been a general appearance.

The general appearance was made before judgment on the complaint and even an appearance after judg-

ment cures any previous defects in personal jurisdiction. *Farmers & Merchants Nat. Bank v. Superior Court*, 25 Cal.2d 842, 155 P.2d 823 (1945), *see, Fount Wip, Inc. v. Golstein*, 33 Cal.App.3d 184, 190, 108 Cal.Rptr. 732, 736 (1973), *cf.*, *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938). Surely, any defects in the original service of summons have been overcome.

Unlike some state procedures which purport to make a general appearance out of an attempt to challenge personal jurisdiction, *cf.*, *Michigan Central Railroad Co. v. Mix*, 278 U.S. 492 (1929); *Harkness v. Hyde*, 98 U.S. 476 (1878), California procedures set no traps for appellant; he is bound to follow state rules. *Richardson Machinery Co. v. Scott*, 276 U.S. 128, 132-133 (1928); *cf.*, *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 524-526 (1931).

Failure to comply with state rules of practice often prevents this Court from considering a federal claim. *American Surety Co. v. Baldwin*, 287 U.S. 156, 168-169, n. 6 (1932). Settled rules require a party to follow local procedure and to limit his "special" appearances to attacks on jurisdiction. Appellant had a fair day in court but elected to address the merits; he does not deserve another day.

This appeal is moot.

II MERITS.

Question Presented.

In an action to establish a Haitian divorce decree as a foreign judgment in California so the mother can modify the child custody and child support provisions and collect child support arrearages, is it reasonable to require the father, a New York resident, to

litigate child support in California when: the original agreement provided for custody of both children in California with the mother part of the year and required year-round child support payments in California; the father sent the 11-year-old daughter to live permanently with the mother two years before the instant action was commenced; the father decided the 14-year-old son should live with his mother after having a California public agency investigate; the father agreed to increase child support in an unspecified amount; the father concedes jurisdiction over child custody; and the father is seriously in arrears in agreed-upon child support?

Statement of the Case.⁵

Dr. Kulko and his wife agreed to obtain a divorce and entered into a written settlement agreement in 1972. [A. 8-12.] At the time, as recited in the agreement, she lived in California and he lived in New York, where they respectively still reside. [A. 8-12.] They agreed she would obtain a Haitian divorce, which she did. [A. 13-16.] Until the present action, neither party has ever attempted to establish the foreign judgment in any state of the United States. [Brf. A., p. 7.]

The agreement provided that Dr. Kulko would have custody of the two minor children, Ilsa, born July 10, 1962, and Darwin, born June 23, 1961, in New

⁵The minor variations in the evidence, primarily regarding arrearages in child support, when Ilsa moved to California, and the conclusionary allegation the children were "induced" by their mother, are stated in the light most favorable to Mrs. Horn, the prevailing party below, in accordance with established standards of review. [J.S., App. A, p. ii, n. 1]; cf., *Evco v. Jones*, 409 U.S. 91, 94 (1972). A complete statement of the case has been made because appellant's version omits material facts.

York for nine months each year. Mrs. Kulko, now Mrs. Horn, was to have legal care, custody, and control of both children in California for three months each summer, plus other holiday periods. [A. 9-10.]

Dr. Kulko agreed to pay support for the children while they were with their mother in California. He was to pay \$3,000 annually, payable in six installments at her address in San Francisco. In addition, he was to pay all obligations incurred on behalf of the children for education, clothing, medical, hospital and dental expense. [A. 10.] As of May, 1976, Dr. Kulko was in arrears for child support under the agreement in the amount of \$12,900 [A. 33] and as of September 8, 1977, \$17,800. [Brf. A., App., p. iii.]

In December, 1973, the youngest child, Ilsa, then 11 years old, told her father she wanted to live with her mother in California. When he sent her to California for the mother's holiday custody period, he bought Ilsa a one-way airplane ticket and sent all of her clothing with her. The daughter continued to live with her mother in California and still lives with her. Since moving, the daughter has gone to New York to visit her father during the summers of 1974 and 1975, returning to her mother each time via airplane tickets purchased by her father. The record does not show any attempt by the father to keep her in New York or to get her to return to live with him. [A. 32.]

In January, 1976, after being with his mother for Christmas, the parties' son, Darwin, then 14 years old, called his mother and said he was in trouble because his father no longer wanted him. He asked permission to live with his mother, as he had said he wanted

to do for some time. Mrs. Horn sent Darwin an airplane ticket and he came to California without his father's knowledge. After he arrived, the mother called Dr. Kulko to inform him Darwin was in California. [A. 32-33.]

After the son came to California, the father contacted the Department of Social Services of the City of San Francisco. A representative of that California public agency contacted Mrs. Horn and both children and reported to the father. He decided the children should live with their mother, writing as follows:

"Dear Sharon

Darwin has informed me of his intention of living with you. I am prepared to accept his decision. The only question in my mind is the way his decision was reached. He has become angry, beligerant [sic] & unlikeable. I can only attribute it to distortion of reality based upon information fed to him in a biased way. Because of this, my quiet gentle loveable child threatened me to do violence to Dominique.

I don't want a human being around me with this type of behavior pattern. You are welcome to it.

I would have hoped that our relationship was going to improve. I feel at this point it is unfeasible [sic].

I would like to renegotiate the original agreement with you in as much as it is invalidated.

I would like for you to present to me what you feel would be a fair & equitable arrangement.

I would like to do it without lawyers as you know how I feel about them.

As always

Ezra" [A. 44-45; Record.]

On February 25, 1976, Mrs. Horn filed a complaint to establish the Haitian judgment as a foreign judgment in California, to modify custody and child support and collect support arrearages. [A. 3.] Dr. Kulko was served personally in New York in accordance with the California Code of Civil Procedure. [A. 18-19.] He moved to quash service of the summons on the grounds that he does not have sufficient contacts with California to maintain the action. [A. 20.]

He does not claim there was a lack of service, nor that the California rules are not calculated to give reasonable notice, nor that the California rules were not followed.

Neither does he contest California's jurisdiction to determine child custody, having conceded jurisdiction to determine custody of Ilsa and Darwin. [J.S., App. A, p. iv; J.S., App. B, p. xx.]

The trial court resolved all facts necessary to find jurisdiction in favor of the mother and children and against the father [J.S., App. A, p. ii, n. 1] and denied the motion to quash. [J.S., App. C, p. xxiii.]

The California Supreme Court affirmed as to Ilsa on the grounds that Dr. Kulko had purposely caused an effect in California and invoked the benefits and protections of that state by deciding to permit her to live with her mother and by sending her there. [J.S., App. A, pp. vii, xi.] As to Darwin, the court saw no affirmative act, but held it was fair and reason-

able to determine support for both children in the same action because support of both children was a single issue under the agreement and Haitian judgment. [J.S., App. A, pp. xii-xiii.] The decision and agreement to let Darwin live in California, support arrearages, and the public agency investigation were not discussed. Two dissenting judges believed there was no purposeful conduct at all because the father only "passively acquiesced in his teenaged daughter's unilateral decision to live in California." [J.S., App. A, p. xvi.]

Dr. Kulko appeals.

Summary of Argument.

The inquiry is whether the relationships between the parties, the litigation, and the forum state furnish the minimum contacts required to make it fair and just to try the child support issues in California. *Shaffer v. Heitner*, Slip Opinion, p. 16; *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Dr. Kulko's combined activities and decisions, considered in the aggregate, easily meet established criteria for exercising jurisdiction. Restatement (Second), Conflict of Laws, §§24, 27, 39.

Dr. Kulko entered into agreements to have his children raised in California. Those contracts, to be performed in whole or in part in the forum state, provide substantial connections. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); Gorfinkel and Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 Hastings L. J. 1163, 1215 (1970).

By sending Ilsa to California to live, and by permitting Darwin to live there with his mother, the father

performed significant acts affecting his parental rights and relationships and linking him to California. *In re Guardianship of Ellick*, 69 Misc.2d 175, 177, 328 N.Y.S.2d 587, 590 (Fam.Ct. 1972); cf., *In re Miller*, *infra*, 548 P.2d 542. Also, he used a state agency to investigate Darwin's living conditions in California before exercising his authority as custodial parent, and generally invoked the benefits and protections of California by having both children reared there. Further, by failing to pay agreed support, he subjected himself to jurisdiction while making it difficult, if not impossible, for the mother and children to pursue him in New York. These acts, considering the special place children have in the law, and the state's interest in the welfare of its children, supply an adequate nexus. *Hines v. Clendenning*, 465 P.2d 460 (Okla. 1970); *In re Miller*, 86 Wn.2d 712, 548 P.2d 542 (1976).

No relationship is closer than that between parent and child, and the subject matter of this action, custody and support, touches the heart of that relationship. With the mother and children living in California, and with custody to be determined there, as Dr. Kulko concedes, only an absence of connections should defeat jurisdiction.

If Dr. Kulko prevails, a custodial father will be able to relieve himself of the day-to-day responsibilities of raising children and, by the same acts, avoid his support duties.

ARGUMENT.

DR. KULKO SUBJECTED HIMSELF TO JURISDICTION BY CONTRACT; BY A CONTINUOUS COURSE OF ACTIVITIES CAUSING CONSEQUENCES IN CALIFORNIA; AND BY HIS CLOSE RELATIONSHIPS TO THE PARTIES, THE SUBJECT MATTER OF THE LITIGATION, AND THE FORUM STATE.

(1) Several Established Due Process Principles Support Jurisdiction.

The exercise of jurisdiction over Dr. Kulko must be measured by the standards set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, *Shaffer v. Heitner*, No. 75-1812 (June 24, 1977), Slip Opinion, p. 24.

International Shoe established the primary test, laying to rest the concept that a defendant must be "present" in the forum state:

"(D)ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

Id., at 316.

"Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

Id., at 317.

The same tests apply to individuals. *Shaffer v. Heitner*, Slip Opinion, p. 16, n. 19.

The reasonableness of exercising jurisdiction is to be determined in each case. *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445 (1952).

Significant connections may be formed by acts outside the state producing results in the forum state, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971); *International Shoe*, 326 U.S. at 318-319; by "continuing relationships and obligations with citizens of another state," *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950); or by enjoying the benefits and protections of the forum state, if the action arises from those activities. *International Shoe*, at 319; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Due process protects a defendant from an assertion of jurisdiction if the suit arises from the "unilateral activities" of the plaintiff and the defendant has no "contacts, ties, or relation" to the state at all, *International Shoe*, at 319, but Mrs. Horn certainly did not act unilaterally and Dr. Kulko's performance and non-performance produced results in California, giving him ties to the forum state.

Great weight is given to the relative inconveniences to the parties, *International Shoe*, at 317; *Travelers Health Assn.*, at 648-649, as well as to the manifest interests of the state in the subject of the action, *Travelers Health Assn.*, at 648; *McGee*, at 223, *see*, Mr. Justice Brennan, concurring and dissenting, *Shaffer v. Heitner*, Slip Opinion, p. 4; principles especially significant in this kind of case.

The appropriate measure has been variously described as the presence of "affiliating circumstances," *Hanson*

v. *Denckla*, at 245-246; "dealings" which make it just to subject a nonresident defendant to local suit, *Shaffer v. Heitner*, Slip Opinion, p. 15, quoting L. Hand, J., *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (CA2 1930); and activity of a "quality and nature" which provides "minimum contacts" with the forum state. *International Shoe*, at 316-319.

The tests were synthesized in *Shaffer v. Heitner*, Slip Opinion, p. 16: The central concern of the inquiry is the "relationship" among (a) the defendant, (b) the forum, and (c) the litigation.

Hanson v. Denckla, with its language stressing the territorial limitations on state power and the need for presence within the forum state, 357 U.S. at 251, 253, upon which appellant relies so heavily [Brf. A., pp. 12-14], does not produce different results. "(T)he Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard."⁶ *Shaffer v. Heitner*, Slip Opinion, p.16, n. 20.

Jurisdiction over nonresidents is needed in domestic relations situations as in other disputes, actually more

⁶For further analyses of *Hanson v. Denckla*, see *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 254-259, 413 P.2d 732, 734-737 (1966); *Zerbel v. H. L. Federman & Co.*, 48 Wis.2d 54, 61-63, 179 N.W.2d 872, 876-877 (1970); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Supreme Court Review 241, 243-244.

Apparently, by his emphasis on the concept of "contacts" requiring physical presence in California at some significant time [Brf. A., pp. 11-12, 14, 17-18 [A. 21-22, 24-26]], and his reliance on the continued "soundness and conceptual structure" of *Pennoyer v. Neff* [Brf. A., pp. 11-12, cf., 17-18], appellant wants to revive the outmoded limitations and fictions so carefully dismantled in *Shaffer v. Heitner*.

so. Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases*, 6 Texas Tech. L. Rev. 1021, 1023 (1975). It is important to protect children from being stranded without support when parents try to avoid their obligations. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976); *Mizner v. Mizner*, 84 Nev. 268, 270-271, 439 P.2d 679, 680-681, cert. den., 393 U.S. 847 (1968); *Mitchim v. Mitchim*, 518 S.W.2d 362, 365-366 (Tex. 1975); *Dillon v. Dillon*, 46 Wis.2d 659, 671, 176 N.W.2d 362, 368 (1970); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 Columbia L. Rev. 289 (1973); Comment, *Domestic Relations: The Role of Long Arm Statutes*, 10 Washburn L.J. 487 (1970). A father should not be able to use jurisdiction principles as a shield from his children.

Mrs. Horn contends jurisdiction is founded upon two accepted bases: First, an act or series of acts, including contracts, outside the state causing an effect in the forum state. Restatement (Second), Conflict of Laws, §§27, subd. (1)(i), 37; Reese and Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 260-261 (1959). Second, other relationships which make the exercise of judicial jurisdiction reasonable, particularly the special relationships between parents, children, and the care and welfare of the children who live in the forum state. Restatement (Second), Conflict of Laws, §§27, subd. (1)(k), 39.

Many of this father's acts, omissions, and relationships, standing alone, provide a jurisdictional basis. In the aggregate, they provide a base much broader than the California Supreme Court deemed necessary.

(2) The Parties, the Forum, and the Litigation Are Naturally Related.

A. The Father's Relationships to the Forum Must Be Considered in the Context of the Special Subject Matter of the Action.

In the case at bar, the nature of the relief sought must be emphasized in balancing the scales. Children have a special place in life which law should reflect, Frankfurter, J., concurring, *May v. Anderson*, 345 U.S. 528, 535-536 (1953), and "family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise." Frankfurter, J., concurring, *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616 (1947). Whether the father is being accorded fair play and substantial justice "must be considered in context with and cannot be divorced from the nature of the underlying controversy which evoked this litigation. One also must keep in mind that the welfare of the children is the paramount concern, coupled with the secondary interests of the parents and the state in the resolution of this issue." *In re Miller*, 86 Wn.2d 712, 720, 548 P.2d 542, 547 (1976).

Ilsa and Darwin are the beneficiaries of this action, although the parents are the named parties. The law knows no closer relationship than parent to child. Nor could the father have a closer relationship to the litigation: care and support of his children, the very essence of the parent-child relationship. He has strong natural ties to the litigation.

His relationship to his children also gives Dr. Kulko strong ties to the forum where the children are domiciled, as do his support responsibilities, with or without

a written agreement. [A. 10.] Cal. Civ. Code, §§196, 207, 4700. He also knew, or should have known, from the beginning, that custody and support are always subject to modification in the best interests of the children. The Haitian judgment was always subject to establishment, modification, and enforcement somewhere, most likely where his former wife lived, so Mrs. Horn would not be without an enforceable order. Thus, the probability of a suit has always been present.

Dr. Kulko gives a curious twist to the closeness of the relationship when he asks the courts not to "interfere" in his personal dealings with his children and their mother. [Brf. A., pp. 13, 18, 26.] Ultimately, he is saying: "I gave her custody and offered to negotiate support without lawyers. She refused. Now let them fend for themselves. Force them to find some way to pursue me in New York." He is asking the courts to side with him against his children and to enhance his already superior bargaining position. A most unusual request.

These relationships are much closer than those upon which jurisdiction usually rests and they meet the usual balancing tests for determining the reasonableness of exercising jurisdiction. *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 196-197 (CA8 1965); *L. D. Reeder Contractors of Ariz. v. Higgins Industries*, 265 F.2d 768, 773, n. 12 (CA9 1959); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); Restatement (Second), Conflict of Laws, §§24, 39; Foster, *Judicial Economy: Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 75, 83, 85 (1969).

B. The Closely Related Custody and Support Issues Should Be Tried in the Same Action.

Dr. Kulko concedes jurisdiction to adjudicate child custody which is raised in the same complaint. [J.S., App. A, p. iv; App. B, p. xx.] Child custody jurisdiction also could be based upon the ordinary tests.

It is reasonable to adjudicate custody of these children where the mother resides and where one of the siblings has lived for two years. Cal. Civ. Code, §§5152, 5156, 5157, 5163; Unif. Child Custody Juris. Act, §§3, 7, 8, 14 (now adopted in at least 20 states, 3 Family Law Reporter 2685 (Sept. 13, 1977)); *Ferreira v. Ferreira*, 9 Cal.3d 824, 109 Cal.Rptr. 80, 512 P.2d 304 (1973); *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739 (1948); *Clark v. Superior Court*, 73 Cal.App.3d 298, 140 Cal.Rptr. 709 (1977); Restatement (Second), Conflict of Laws, §79. Having acquired the requisite custody jurisdiction, *May v. Anderson*, 345 U.S. 528 (1953), by the ordinary tests, as well as by concession, the courts could justify refusing to litigate child support in the same proceeding only for the strongest of reasons.

Even though Dr. Kulko agreed to a custody change [A. 44], a position on which he now equivocates [A. 30], the court still must review the arrangements and is not bound by any stipulation. *Ford v. Ford*, 371 U.S. 187, 193 (1962); *Black v. Black*, 149 Cal. 224, 86 Pac. 505 (1906); 32 Cal.Jur.3d, Family Law, §234.

In addition, the propriety of awarding child custody to the mother may well depend on whether she can get adequate support for the children. A destitute mother could not care for the children no matter how

loving she might be, and any mother is entitled to an appropriate contribution from the father.

With custody litigation proceeding in California, another suit in New York would only add to efforts, expenses, and emotions. If Dr. Kulko prevails, "divisible" divorce, *Estin v. Estin*, 334 U.S. 547, 549 (1948), will become splintered divorce.

The decisions he relies upon do not require such a result.⁷

Schoch v. Superior Court, 11 Cal.App.3d 1200, 90 Cal.Rptr. 365 (1970) [Brf. A., pp. 17-18, 26], was decided under the predecessor to California Code of Civil Procedure section 410.10. Under it, California did not have jurisdiction unless the defendant was a resident "at the time the cause of action arose." 11 Cal.App.3d at 1203, n. 1, 90 Cal.Rptr. at 366, n. 1. No cause of action arose in California because the nonresident father was paying ordered child support. Child custody was not an issue.

Judd v. Superior Court, 60 Cal.App.3d 38, 131 Cal.Rptr. 246 (1976) [J.S., App. A, pp. vii-x], also involved only child support. The mother, who had full custody, moved to California. The father paid child support as agreed and corresponded, talked to the children by telephone, and visited on a few occasions. "(T)he father had not purposely availed himself of the protections and benefits of the laws of California since he had never had custody of the children and had not sent them to California." [J.S., App. A, p. x.] He was in no way "responsible for his former

⁷For discussion of appellant's other arguments, please see part I(2) of this brief, above.

wife and his children moving to California." 60 Cal. App.3d at 45, 131 Cal.Rptr. at 249.

In *Titus v. Superior Court*, 23 Cal.App.3d 792, 100 Cal.Rptr. 477 (1972) [J.S., App. A, pp. vii-xi], the nonresident father had legal custody and sent the children to California for summer visitation with the mother's written agreement to return them. She refused to return the children, in breach of the agreement, and filed for custody and support. Support jurisdiction was declined by application of clean hands doctrine. Custody jurisdiction was asserted because the children were physically present, but custody jurisdiction should have been declined because of the mother's unclean hands. *Ferreira v. Ferreira*, 9 Cal.3d 824, 835, n. 10, 109 Cal.Rptr. 80, 87, n. 10, 512 P.2d 304, 311, n. 10. Jurisdiction would be declined now under the Uniform Child Custody Jurisdiction Act. Cal. Civ. Code, §§5152, 5156, 5157.

In any event, Dr. Kulko did not send Ilsa for a temporary visit, but for permanent residence [J.S., App. A, p. xi], and he also decided Darwin should live permanently in California, a decision which obviously affected his parental rights and his relationship to his child. *In re Guardianship of Ellick*, 69 Misc.2d 175, 178, 328 N.Y.S.2d 587, 590 (Fam. Ct. 1972).

The California Supreme Court properly analyzed, distinguished, and limited the holdings of its own lower courts. [J.S., App. A, pp. vii-xi.] There is no reason to override its interpretations. Casual acts and temporary visitation differ from deliberate, permanent changes of custody.

(3) Dr. Kulko's Course of Conduct Deliberately Caused Consequences in California.

Dr. Kulko entered into an agreement with Mrs. Horn, when she was living in California, allowing her to have their two children in her custody part of the year and requiring him to pay her support. In performing her end of the bargain, Mrs. Horn necessarily used California facilities and the protection of its laws. When Ilsa moved there, with her father's consent if not his blessings, she benefited directly from all the services of the state and its laws and tax monies, which directly benefited Dr. Kulko. [J.S., App. A, p. vii.] The same is true of his decision to let Darwin stay in California. Those consequences were foreseeable and intended.

"(A) nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the nonresident parent for actions concerning the support of these children." [J.S., App. A, p. vii.]

See also, J.S., App. A, pp. x-xi.

Dr. Kulko committed several additional specific acts having immediate effects in California and calculated to cause activity there. *Cf.*, *Bernardi Bros., Inc. v. Pride Manufacturing, Inc.*, 427 F.2d 297, 299 (CA 3 1970); Restatement (Second), Conflict of Laws, §37, and Caveat; Unif. Crim. Extradition Act, §6; Cal. Penal Code, §1549.1.

He put Ilsa, then eleven years old, on a plane with a one-way ticket and all of her clothes, returning her twice after visitation. [A. 32.] He investigated the living conditions before letting Darwin stay, contacting a California public agency to conduct the investigation [A. 33], certainly a direct use of California facilities. Although not developed in the record, both children would have needed their school records to enroll in their new school, as well as their medical and dental records, and Darwin's belongings, requiring specific acts by the father in furtherance of his decision to change the custody of the children.

The father contends he merely "acquiesced" when his daughter wanted to live in California. [Brf. A., pp. 6, 16-17, 19.] (Compare his previous position that he "passively submitted" [J.S., p. 18] when his daughter unilaterally "announced her decision" [J.S., p. 22] to live in California.) But the notion that a father is an innocent bystander when an eleven-year old child decides where she will live is startling.

Not only is his proposition novel, it is contrary to law. No minor child can unilaterally decide which parent will have custody. The child's wishes may be considered, though one wonders how much weight will be given to an eleven-year old's opinion, but the final decision is up to the court. *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 716 (1974); *In re Marriage of Mehlmauer*, 60 Cal.App.3d 104, 131 Cal.Rptr. 325 (1976).

Further, the custodial parent has responsibility for the well-being of the children, "custody embraces the sum total of parental rights." *Burge v. City and County of San Francisco*, 41 Cal.2d 608, 617, 262 P.2d 6,

12 (1953). An exercise of those rights requires a deliberate decision. Placing the children, both children, with the mother was an act causing consequences in California which subjected him to jurisdiction. *In re Guardianship of Ellick*, 69 Misc.2d 175, 328 N.Y.S.2d 587 (Fam. Ct. 1972); *In re Miller*, 86 Wn.2d 712, 548 P.2d 542 (1976). After all, the children were not mere merchandise casually placed in the mails as an incidental transaction. They were Dr. Kulko's most solemn responsibility.

His failure to pay the agreed support is significant, too. It obviously caused Mrs. Horn to provide support in California and necessitated further use of that state's protection. Moreover, a nonresident's failure to pay support is an act committed within the state which is a basis for jurisdiction, both criminally, Rev. Unif. Reciprocal Enforcement of Support Act, §5; Cal. Code Civ. Proc., §1660, and civilly, *State ex rel. Nelson v. Nelson*, 298 Minn. 438, 216 N.W.2d 140 (1974); *In re Miller*, 86 Wn.2d 712, 719, 548 P.2d 542, 547; *Poindexter v. Willis*, 23 Ohio Misc. 199, 51 Ohio Ops. 157, 256 N.E.2d 254 (Illinois law).

Beyond doubt, the mother did not act unilaterally, and the father's acts and omissions caused her to invoke the benefits and protections of California laws. He knowingly benefited himself and knowingly benefited his children. Cf., *Hanson v. Denckla*, 357 U.S. at 253. His conduct was purposeful.

Dr. Kulko's position that he could not foresee any results in California [Brf. A., pp. 19-23] is untenable. His allegedly passive role is belied by his conduct. The children's father should not be able to avoid a support order in the children's domicile because he

now pretends to have abdicated his parental duties by passively acquiescing to their wishes. He is directly responsible for the children now living in California. He is subject to this suit.

(4) The Father's Agreements to Have His Children Raised in California and to Pay Support Were Contracts Having Substantial Connections With the State.

The original contract between the mother and the father expressly contemplated the children would be in the mother's custody in California for substantial parts of each year, with child support to be paid year-round. [A. 8-12.] Then the father modified the agreement by deciding Ilsa should live in California and visit him during the summers. He further modified the agreement by deciding it would be best if Darwin lived with his mother. He also impliedly agreed by letter to pay more child support, leaving open only the amount. [A. 32-33, 44.]

Consequently, three voluntary contracts are to be performed in substantial part in California; the original written divorce settlement and two modifications. Cal. Civ. Code, §1698; 1 Witkin, *Summary of Cal. Law* (8th ed. 1973), Contracts, §715, pp. 600-601. Both performance and non-performance had plainly foreseeable consequences in California. The contracts are enforceable in this action.

"It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *McGee v. International Life Ins. Co.*, 355 U.S. at 223. Great weight is given to the consequences of the contract in the forum state.

Travelers Health Assn. v. Virginia, 339 U.S. at 648. If, when the agreement was executed, the defendant could foresee that some or all performance would take place in the forum state, "(t)he cases leave little room for doubt" that the "requisite substantial connection exists and long-arm jurisdiction over an absent defendant may properly be assumed." Gorfinkel and Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 Hastings L. J. 1163, 1215 (1970). The very purpose of these agreements was performance in California.

Dr. Kulko's activities fit many descriptions of dealings sustaining jurisdiction. He acted deliberately, *N. K. Parrish, Inc. v. Schrimsher*, 516 S.W.2d 956, 959 (Tex. 1974), contemplated a continuing relationship with California residents, *Midwest Packaging Corp. v. Oerlikon Plastics, Ltd.*, 279 F.Supp. 816 (S.D. Iowa 1968), actively participated in various decisions, *Controlled Metals, Inc. v. Non-Ferrous Intern. Corp.*, 410 F.Supp. 339, 343 (E.D.Pa. 1976), and knew the mother would perform all of her obligations in California. *W. A. Kraft Corp. v. Terrace On Park, Inc.*, 337 F.Supp. 206, 209 (D.N.J. 1972); *Engineered Prod. v. Cleveland Crane & Engineering*, 262 S.C. 1, 6, 201 S.E.2d 921, 923 (1974).

Weighing his activities as they occurred, in combination, against the background of the subject of the contracts, the contacts are significant. Cf., *Ward v. Formex, Inc.*, 27 Ill.App.3d 22, 325 N.E.2d 812 (1975); *Margaret Watherston, Inc. v. Forman*, 73 Misc.2d 875, 342 N.Y.S.2d 744 (1973); *Proctor & Schwartz, Inc. v. Cleveland Lumber Co.*, 228 Pa.Super. 12, 323 A.2d 11 (1974). These contacts would be

enough in a commercial setting and should be more than enough in these circumstances.

Although the California Supreme Court did not treat this aspect of the parties' dealings, the contractual relationships provide an accepted, independent basis for exercising jurisdiction as to both children.

(5) The State Has a Manifest Interest in the Welfare of Children Residing Within Its Borders and a Special Duty to Protect Them.

One of the primary factors to be weighed is the interest of the forum state in the subject matter of the suit. *McGee v. International Life Ins. Co.*, 355 U.S. at 223; *Travelers Health Assn. v. Virginia*, 339 U.S. at 647-648; see, Mr. Justice Brennan, concurring and dissenting, *Shaffer v. Heitner*, Slip Opinion, p. 4. The state's interest in domestic relations litigation involving children is surely as great as its interest in providing a forum for insurance claimants. *Hines v. Clendenning*, 465 P.2d 460, 463 (Okla. 1970); *Tiedman v. Tiedman*, 195 Neb. 15, 20, 236 N.W.2d 807, 810 (1975), if only to protect residents from becoming public charges. *Mizner v. Mizner*, 84 Nev. 268, 270-271, 439 P.2d 679, 680-681, cert. denied, 393 U.S. 847 (1968); *Dillon v. Dillon*, 46 Wis.2d 659, 671, 176 N.W.2d 362, 368 (1970); Cal. Code Civ. Proc., §1660 (a nonresident parent may be extradited for failure to support).

Also, since children are at a disadvantage in dealing with adults, Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657, 661-662 (1959), jurisdiction will be asserted to protect children in circumstances where jurisdiction would be declined if only adults

were involved. *Ibid.*; Cf., *Sampsell v. Superior Court*, 32 Cal.2d 763, 777-781, 197 P.2d 739, 748-750. This special interest is expressed in the concept of *parens patriae*: a duty to protect all infants, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *In re Guardianship of Ellick*, 69 Misc.2d 175, 178, 179, 328 N.Y.S.2d 587, 590, 591 (Fam.Ct. 1972); 59 Am. Jur.2d, Parent and Child, §9; 67 C.J.S., Parent and Child, §10; 32 Cal.Jur.3d, Family Law, §177, a duty courts take seriously.

California has a substantial, legitimate interest in the case and considerable deference should be given to its desire to provide a forum.

(6) California, Where the Mother and Children Reside, Is the Just and Convenient Forum.

Another factor to be weighed is the convenience of the forum chosen by the plaintiff-mother. The court must make an "estimate of the inconveniences," *International Shoe*, 326 U.S. at 317, a phrase borrowed from Judge Learned Hand who equated the test to inconvenient forum analysis. See, *L. D. Reeder Contractors of Ariz. v. Higgins Industries*, 265 F.2d 768, 775 (CA9 1959). This Court has taken the same approach. Cf., *McGee v. International Life Ins. Co.*, 355 U.S. at 223-224; *Travelers Health Assn. v. Virginia*, 339 U.S. at 648-649.

The plaintiff's choice of forum should be disturbed only if there are weighty reasons in favor of defendant. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509 (1947); Restatement (Second), Conflict of Laws, §84, comment c. Dr. Kulko could have combined a motion to dismiss for inconvenient forum with his motion

to quash the summons, Cal. Code Civ. Proc., §418.10, subd. (a)(2); Cal. Civ. Code, §5156, but he did not. Hence, there is no reason to consider California particularly inconvenient to him.

Custody is to be tried in California, the children are domiciled there, and the witnesses to the mother's care of the children live there. Likewise, the witnesses to the current needs of the children, particularly any special needs, the standard and style of living, the ability of the mother to contribute to support, the current health of the children and the mother, school records, and virtually all other witnesses are located there. The only evidence to be produced from New York is Dr. Kulko's testimony and his ability to pay support, the latter being primarily documentary evidence. Cf., *Gulf Oil Corp. v. Gilbert*, supra, 330 U.S. at 508-509; *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 443-444, 176 N.E.2d 761, 766-767 (1961).

Another significant consideration, peculiar to support and custody proceedings, is that the court making the orders will have continuing responsibility to modify the provisions if circumstances change in the future. Cal. Civ. Code, §§4600, 4700; N.Y. Dom. Rel. Law, §240. Since the children are in the forum state by the design of both parents, not as transients or as the result of child snatching, preference should be given to California as a forum so determination of future support changes may be had in the state of the children's probable permanent residence. Such a preference is particularly appropriate when future custody and visitation changes will be litigated there.

The expense of taking an entourage to New York, perhaps several times, is significant, *Travelers Health Assn.*, 339 U.S. at 648-649, as is the fact that Dr. Kulko helped choose the forum in which Mrs. Horn must litigate by placing the children with her and failing to pay support. If a father can avoid trial where the children live, he may well force the mother to forego support and make himself judgment-proof; the cost of pursuing him may become greater than the gain, if he can be pursued at all. Cf., *Hines v. Clendenning*, 465 P.2d 460, 463 (Okla. 1970).

Although the usual focus is on the defendant's inconvenience, it is appropriate to give great weight to the convenience to Mrs. Horn of access to California courts. Cf., *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 255, 413 P.2d 732, 734-735; von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1166-1173 (1966); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L. J. 289, 312-314 (1956). If Dr. Kulko prevails, he will have sent his children to California and, by the same move, sidestepped his responsibilities, an unconscionable result.

California is the most convenient forum. The judgment should be affirmed.

Conclusion.

Considering the special subject matter of this action, the close relationship of the parties, and the fact the children and the mother reside in California, the father's agreements to have the children raised in California, his parental decisions, his acts in sending them to

California, and his use of California's facilities, form an ample basis for jurisdiction. The state's interests in enforcing support duties and the relative convenience of litigating in California are added reasons to honor the mother's choice of forum.

The judgment should be affirmed and the cause remanded to the Superior Court of California in and for the City and County of San Francisco, No. 701 626, for further proceedings.

Respectfully submitted,

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APPENDIX.

California Code of Civil Procedure.

Chapter 5. Objection to Jurisdiction

§ 418.10 *Motion to quash service of summons or to stay or dismiss action; procedure*

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive plead-

ing in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.